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In The

Supreme Court of the United States

October Term, 1996

CENTRAL OFFICE TELEPHONE, INC.,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October, 1997

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in holding that a trial court does not infringe upon the province of the jury in contravention of the Seventh Amendment to the United States Constitution when it enters judgment as a matter of law reducing a jury award of damages, in lieu of a grant of remittitur or of a new trial, where the jury delivered a general and not a special verdict, such that the trial court resorted to its own intuition as to which portion of the damages were predicated upon evidence which it determined post-trial to have been improperly admitted.

2. Whether the Ninth Circuit Court of Appeals erred in holding that a trial court may enter judgment as a matter of law reducing a jury award of damages based on the trial court's post-trial determination that expert testimony admitted during the trial should have been excluded, where all other circuits that have ruled on this issue have found that in order to prevent unfair reliance and prejudice the only proper procedure is to grant a new trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner **Central Office Telephone, Inc.** respectfully prays that a writ of certiorari issue to review the Opinion of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court Appeals (App. 1-37) is reported at 108 F.3d 981, (9th Cir. 1997). The opinion of the lower court from which the appeal is taken (App. B) is unreported.

JURISDICTION

The Opinion of the Court of Appeals for the Ninth Circuit was entered on February 26, 1997, *Central Office Telephone, Inc. v. American Telephone and Telegraph Company*, 108 F.3d 981, (CA9 1997) and reprinted as Appendix A hereto. A timely petition for rehearing and suggestion of rehearing en banc was denied on July 18, 1997, the order for which is reprinted as Appendix E hereto.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII, United States Constitution:

> ****[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.****

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Central Office Telephone, Inc. ("COT"), a reseller of long-distance telecommunication services, appeals the decision of the Ninth Circuit Court of Appeals affirming the District Court's partial grant of judgment as a matter of law in favor of respondent American Telephone and Telegraph ("AT&T"). That grant reduced the jury verdict awarded COT from $13 million to $1.15 million.

Resellers are firms that purchase "bulk" long distance services from carriers and resell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of AT&T, as well as its competitor, and the end users are the customers of the reseller.

In the fall of 1989, COT became aware of the opportunity to resell AT&T's "Software Defined Network" ("SDN") service to its customers. SDN is a virtual private network service that allows an AT&T customer, in consideration for a commitment to purchase large volumes of minutes of long distance usage, to receive substantially higher discounts than provided for other available AT&T long distance services.

COT developed a business plan to include the addition of salesmen, telemarketing and expansion into other states, and on October 30, 1989 signed an agreement letter memorializing COT's selection of SDN Expanded Volume Program Plan 2, under which COT would receive a 17 to 20% discount off of basic SDN rates in exchange for a renewable four-year commitment to purchase 2 million minutes annually. COT also selected the SDN Multiple Location Billing Option under which

AT&T would bill up to 6000 of COT's SDN service locations at no extra charge.

When COT began selling SDN services it immediately experienced provisioning delays. Due to these problems, AT&T suggested that COT "park" its customers under a new and different service known as Multi-Location Calling Plan ("MLCP"). Its purpose was to serve COT's customers' long-distance needs until they could be provisioned onto SDN. This service commenced on March 8, 1990.

On April 9, 1990, AT&T informed COT that its first account had been placed onto the SDN. Believing that its SDN was now functional, COT upgraded its SDN subscription to Plan 6, which offered a larger discount (up to 24%) in exchange for a larger volume commitment (15 million minutes annually).

Unbeknownst to COT, on or about March 1, 1990, AT&T, through an Ad Hoc committee formed to "kill" the arbitrage by which resellers conducted their business, initiated multiple strategies to discourage resale.

After COT signed the April 9 contract and continuing until September 30, 1992 when COT canceled its SDN contract with AT&T to avoid going out of business, COT and its customers experienced, among other things, transferred accounts, decreased service, slow or non-existent provisioning of both SDN and MLCP orders, lost orders, limited calling card service, discount misallocation between COT and its customers, incorrect billing, untimely call detail billing, delayed billing, slamming of customers, and increased rates. As of termination date, COT had lost over 75% of its customer base.

COT would have completed its first renewable four-year contract by April 9, 1994, absent AT&T's misconduct, and by date of trial in May of 1994 would have commenced its second

four-year contract. As of trial date, SDN was still AT&T's "flagship" service, utilized by many Fortune 500 companies, and in AT&T's own World Headquarters.

II. PROCEEDINGS BELOW

On June 27, 1994, in the United States District Court for the District of Oregon, a jury entered a verdict finding AT&T liable for willful misconduct in breaching its contract with COT, and intentional interference with COT's contracts with its customers. The jury awarded COT damages against AT&T in the amount of $13 million.

On November 9, 1994, the district court granted in part and denied in part AT&T's motion for judgment as a matter of law. The district court found that COT's evidence with respect to damages was not sufficiently grounded in objectively verifiable facts after 1992, when COT was forced by AT&T's conduct to quit the contract, and reduced the damages award to reflect that decision. The district court determined that the proper amount of damages was $1.154 million

COT appealed the district court's partial grant of judgment as a matter of law on several grounds. COT argued that the grant was improperly executed with respect to the Seventh Amendment of the United States Constitution; that it unfairly prejudiced COT by eliminating, post-trial, evidence which COT had been made to rely upon following its admission at trial; and that it was improper to reduce the jury damages award without offering COT the alternative of a new trial.

On February 26, 1997, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision with regard to its partial grant of AT&T's motion for judgment as a matter of law. The appellate court noted that the United States Supreme Court had previously ruled that judgment

as a matter of law does not, in general, offend the Seventh Amendment right to a jury trial.

REASONS FOR GRANTING THE WRIT

I. A COURT VIOLATES THE SEVENTH AMENDMENT WHEN IT SUPPLANTS A JURY VERDICT ON DAMAGES BY WAY OF JUDGMENT AS A MATTER OF LAW, AND ON THE BASIS OF ITS OWN INTUITIONS.

It is well established (and not questioned here) that judgment as a matter of law, as embodied in Rule 50 of the Federal Rules of Civil Procedure, does not, in general, conflict with the Seventh Amendment of the United States Constitution. *See, e.g., generally, Montgomery Ward & Co. v. Duncan.* 311 U.S. 243 (1940). It is also well established, however, that there are specific situations where judgment as a matter of law is manifestly inappropriate. *See, e.g., Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54-55 (CA3 1989). The present case, substantially similar to *Bereda*, belongs in the latter category. If it is instead ruled to belong in the former category, and the Ninth Circuit Court of Appeals opinion is affirmed, the Seventh Amendment right to a jury trial will be substantially eroded.

Judgment as a matter of law may be entered against a party when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). The necessity for the procedure has been described as follows: "[Judgment as a matter of law] is a device to save time and trouble... [but it is also] something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law – compassion and prejudice."

Rutherford v. Illinois Central Railroad Company, 278 F.2d 310, 312 (CA5), *reh'g denied*, 276 F.2d 330 (CA5), and *cert. denied*, 364 U.S. 992 (1960). The desirability of these goals and the propriety of a rule which promotes them are not debated herein.

While judgment as a matter of law serves important purposes, however, it must achieve balance with the purposes served by the Seventh Amendment guarantee of the right to a jury trial. *See, e.g., Coates v. Daugherty*, 973 F.2d 290, 293 (CA4 1992) (stating that in ruling on a motion for judgment as a matter of law "'[o]ur power of review continues to be limited by the Seventh Amendment....'") (quoting *Lust v. Clark Equipment Co., Inc.*, 792 F.2d 436, 437 (CA4 1986)); *generally, Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211 (1996) (analyzing the permissibility of appellate review of jury verdicts in light of Seventh Amendment jury trial guarantee).

The Seventh Amendment guarantees that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt., VII (App. 76). Where judgment as a matter of law would infringe upon the province of the jury as provided for in the Seventh Amendment, it is inappropriate. *See id.* In such a case, the proper remedy is for the lower court to grant a new trial on the issue of damages. *Bereda*, 865 F.2d at 55; *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1548 (CA5 1984). Or, if this Court prefers, it may simply reinstate the jury verdict. *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 650 (1969). *See* I.B., page 18.

A. The district court had no alternative upon finding possible error in the lost profits calculation but to grant a new trial limited to the issue of damages.

The plain language and historical interpretation of the Seventh Amendment disallow judgment as a matter of law where the alleged error is insufficient to dismiss the claim as a whole. Additionally, federal circuit courts have held that, in cases where a jury returns a general verdict for damages (including lost profits damages) based in part upon expert testimony, if the district court finds error in the calculation of those damages, the proper remedy is not judgment as a matter of law, but rather is a new trial limited to the issue of damages. *Bereda*, 865 F.2d at 55; *Nissho-Iwai*, 729 F.2d at 1548. Finally, this Court has held that granting a new trial solely on the issue of damages does not offend the Seventh Amendment. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 499 (1931). Thus, the district court in the present case erred in granting judgment as a matter of law. If the district court was correct in deciding that the damages figure was reached erroneously, then a new trial limited to the damages issue should be granted.

1. The historical interpretation and traditional understanding of the Seventh Amendment disallow judgment as a matter of law where the alleged error is insufficient to dismiss the claim as a whole.

The Seventh Amendment, adopted in 1791, provides that, "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amdt. VII. At common law in 1791, a judgment on a verdict could be either suspended by granting a new trial, or, less commonly, arrested by setting it

aside upon matters of law. 3 William Blackstone, Commentaries *387, *393. According to Blackstone it is "an invariable rule with regard to arrests of judgment upon matters of law, 'that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea.'" *Id.* at *393-94.

Judgment as a matter of law (or judgment *non obstante veredicto*) was a mid-eighteenth century outgrowth of the "older and rather obscure motion in arrest of judgment." Edith Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 316 (1966). As with motions in arrest of judgment, judgment as a matter of law "lay only when the defense or matter or rejoinder pleaded was deficient at law – so that a demurrer could have been proper – but when the case had nevertheless been allowed to go to the jury." *Id.*

Thus, while judgment as a matter of law is a proper procedure under the Seventh Amendment, its application is limited by the language and the historical interpretation of the Amendment. In the present case, the grant of judgment as a matter of law exceeded constitutional limits. Plainly, AT&T could not have moved successfully to dismiss COT's claim, much less the subpart dealing with lost profits, on speculation that COT might not put on sufficient evidence at trial to support it. Furthermore, the error found in the present case was evidentiary, and at common law in 1791 the only post-verdict remedy available where the issue was evidentiary was a new trial. *Id.* at 311-12. Therefore, the grant of judgment as a matter of law in the present case was unconstitutional.

2. ***Precedent indicates that where there is a general jury verdict, a district court that finds possible error in the calculation of lost profits has no alternative but to grant a new trial on the issue of damages.***

In *Bereda*, a Title VII sex and age discrimination case, the district court erred in failing to instruct the jury that only two years of back pay damages were allowable under Title VII. 865 F.2d at 53. The Third Circuit Court of Appeals surmised that because of this error the jury award of $55,000 may have reflected seven years (the period suggested by plaintiff at trial) of back pay damages. *Id.* at 51, 53. This notion was strongly supported by the fact that the award appeared to be based on plaintiff's expert's damages differential figure, as described at trial, multiplied out over seven years. *Id.* at 54.

The appellate court admitted that it was "tempted simply to reduce the award to reflect" the proper time period, using the same differential figure that the jury presumably used. *Id.* The court rejected such a solution as improper, however, and emphasized that "[i]n the absence of a special verdict on this point... we cannot be sure how the jury evaluated the damage evidence or how it arrived at its verdict." *Id.* at 55.

In a footnote, the court laid out possible alternative ways by which the jury might have reached its conclusion. *Id.* at n. 4. Because these possibilities existed, comparatively remote though they may have been, the court held that "[r]ather than recalculating the award to reflect our intuition as to how the jury arrived at its verdict, the proper procedure is to remand for a new trial on the issue of damages." *Id.* at 55.

In the present case, the jury returned a general verdict awarding COT $13 million. App. 78. There were a number of possible ways the jury may reasonably have come to settle on

this award, especially where COT presented evidence at trial that its compensatory damages amounted to $14.5 million. App. 43. For instance, the jury could have simply cut off COT's lost profit damages in 1998, when COT's renewed contract with AT&T would have expired; or the jury could have discounted COT's $14.5 million damages claim based on other factors that it did not believe COT accounted for in its calculations; and so forth.

In spite of the unknowable process underlying the general verdict, and in spite of the Third Circuit's holding in *Bereda* that courts must resist the temptation in such a situation to intuit as to that process in order to justify an alteration of the jury verdict, the district court in the present case (with the subsequent sanction of the Ninth Circuit) ordered a reduction of over 90% of the jury's award based on its guess as to how the jury calculated and decided upon that award. App. 52-53, 65]. As in *Bereda*, this action derived from the determination that the judge had erred in what he allowed the jury to consider. Also like *Bereda*, this action went beyond the acceptable parameters of judgment as a matter of law, and intruded upon the province of the jury in violation of the Seventh Amendment.

The Fifth Circuit Court of Appeals has also held that Seventh Amendment concerns may act as a constraint on judicial alteration of a jury award, and it did so within the context of a lost profits claim. *See Nissho-Iwai*, 729 F.2d 1530 (CA5 1984). In *Nissho-Iwai*, the jury in a breach of contract case awarded the plaintiff over $7 million in damages. *Id.* at 1537. On review, the appellate court found that the verdict was improper to the extent that it included lost profits between October 1, 1976 and March 31, 1977, a period during which the parties had agreed to suspend performance obligations. *Id.* at 1547.

The court noted, however, that the general verdict did not identify the specific considerations that went into the sum. *Id.* The court further noted that the sum differed from plaintiff's own proof. *Id.* Based on these factors, the court concluded that it had no alternative but to remand for a new trial limited to the issue of the proper measurement of damages. *Id.* at 1548. The court also concluded that at the new trial, plaintiff could attempt to prove that there was in fact no suspension of obligations. *Id.* at n. 29. This could be done despite the fact that the record as it stood before the court supported only a finding that there was a suspension, since, the court acknowledged, "it is conceivable that there is some evidence not previously introduced that disproves the suspension." *Id.*

In the present case, the general verdict did not identify the specific considerations that went into the sum chosen by the jury. App. 78. Additionally, that sum differed from the $14.5 million sum that COT's expert testified to at trial. App. 42-43. Therefore, the court had no alternative upon finding possible error in the lost profits calculation but to grant COT a new trial on damages. Moreover, on re-trial COT should be permitted to present new evidence as to the existence and extent of those lost profits.

There is no question but that judgment as a matter of law, properly executed in an effort to further the policy concerns from which it is derived, does not conflict with the Constitution. But the Constitution still governs, and limits, application of judgment as a matter of law. In this case, the verdict does not clearly indicate how it was arrived at or what it contemplates. Consequently, the court is precluded by the Seventh Amendment from reducing the jury verdict by virtue of a judgment as a matter of law based on the court's intuition as to how the jury award was reached.

Additionally, in the present case there is no indication that judgment as a matter of law would serve to protect neutral principles of law from powerful forces such as compassion and prejudice. And while sanctioning grants of judgment as a matter of law based on judicial speculation as to jury considerations would undoubtedly conserve court time, that policy goal is far outweighed by the competing and superior policy goal embodied in the Seventh Amendment.

The purpose and importance of the Seventh Amendment has been expressed as follows: "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). Courts have honored this ideal by consistently and uniformly deferring to the jury the right to make factual determinations such as the one at issue in this case. No court's decision to reduce a jury verdict on damages has ever been allowed to stand, unless it was a remittitur accompanied by the right to opt for a new trial, or a judgment as a matter of law pertaining to a discernibly separate and distinct issue or award. The course of action taken in the present case by the district court post-trial and affirmed by the Ninth Circuit court is unprecedented and, moreover, unconstitutional. A new trial on the issue of damages ought therefore to be granted.

3. *This Court has found that granting a new trial limited to the issue of damages is permissible where, as here, the issues of liability and damages are separate.*

This Court has held that granting a new trial solely on the issue of damages does not offend the Seventh Amendment.

Gasoline Products, 283 U.S. at 499; *see also* Fed. R. Civ. P. 59(a) (providing that a new trial may be granted on part of the issues). The practice must be limited, however, to cases where the issues of liability and damages are separate. *Gasoline Products*, 283 U.S. at 499

The policy arguments in favor of partial new trials have been summarized as follows: "Retrial of a properly decided liability issue, when error has tainted only the monetary damages issue, arguably works injustice upon the plaintiff who already has proven the claim adequately to the jury. [Additionally], a complete retrial wastes judicial time and resources and results in unnecessary delay." James A. Henderson, Jr. et al., *Optimal Issue Separation in Modern Products Liability Legislation*, 73 Tex. L. Rev. 1653, 1678 (1995) (citation to *Gasoline Products* omitted).

In the present case, because liability has already been found (App. 77-78, 64-65, 26) and because damages is an issue separate from liability, the interests of justice and judicial economy mandate that if there be a new trial, it ought to be limited to the issue of damages.

Gasoline Products involved a complicated and uncertain record as to the nature and extent of several oral and written contracts. The appellate court reversed a jury verdict in favor of petitioner, Gasoline Products Co., due to errors in the charge of the trial court with respect to the measure of damages. *Id.* at 496. The case was remanded for a new trial limited to the issue of damages. *Id.*

In considering the limitation on the new trial as ordered by the appellate court, this Court announced that "the Seventh Amendment... does not require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another

distinct issue, because erroneously determined, must again be passed on by a jury." *Id.* at 498. However, the Court found that because the new jury would have to be informed of a number of particulars regarding the contracts themselves in order to pass on the claim for loss of profits, a new trial should have been ordered on all issues. *Id.* at 499-500. The Court concluded that "the question of damages... is so interwoven with that of liability" that the two could not be separated. *Id.* at 500-501.

The present case is clearly distinguishable from *Gasoline Products*. None of the nine "concerns" expressed by the trial judge in his opinion granting judgment as a matter of law (App. 54-60) raised questions concerning the original contracts themselves, which was the overriding concern of the *Gasoline Products* Court. In fact, both the district court (App. 64-65) and the Ninth Circuit Court of Appeals (App. 26) agreed with the jury that AT&T was liable for breach of contract.

Moreover, the jury found AT&T liable not only for willful misconduct with regard to contract (App. 79-80, 77), but also for intentional interference with contract. App. 77. In his opinion for the amended judgment, the trial court judge affirmed the jury's finding of liability on the intentional interference claim. App. 65. He even went so far as to express his satisfaction with the liability finding in recommending that "[i]f an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand." App. 48. The Ninth Circuit Court of Appeals also recognized that COT prevailed on its claim for tortious interference with contract, and therefore remanded this case for a new trial on the issue of punitive damages. App. 26. Regardless of any questions as to contract, the issue of liability remains settled due to the uniform finding that there was intentional interference with contract on the part of AT&T.

In summary, both courts allowed for the award of damages on both claims, indicating that the liability issue had been correctly determined. The only question that concerned those courts was how much the damages award should be. That question is not so interwoven with the properly resolved liability question that the two cannot be separated. Rather, the issues of damages and liability are distinct, such that if there was indeed error in the jury's determination of damages, that issue may be retried separately.

The case law confirms that in a case such as this it is entirely proper and consistent with sound policy to order a new trial limited to the issue of damages. In *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1480 (CA10 1985), the court found that the jury had erred on the issue of damages in a complex contract case. The court noted, however, that "[t]he confusion concerning the proper measure of damages... did not affect the determination of liability." *Id.* Thus, the court held that "the interests of justice require a new trial as to the proper amount of damages." *Id.*

In *Center Chemical Co. v. Avril, Inc.*, 392 F.2d 289, 291 (CA5 1968), the appellate court found that there had been insufficient proof to support the jury's award of lost profits damages due to breach of contract. The court noted that "[d]amages in [future lost profits cases] like this are inherently difficult of proof, [but this] is not to say that damages would be impossible of proof." *Id.* Stating that there was clear evidence that the contract had been breached, the court remanded the case for a trial solely on damages. *Id.*

In *Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242, 1245-46 (CA5 1980), the appellate court found that *Gasoline Products* did not require a new trial on all issues where the case involved a tort claim of wrongful discharge. The court

held that the evidence was insufficient to support the jury's damages award, but that it *was* sufficient to support the liability finding. *Id.* Thus the court affirmed the lower court's order for a new trial limited to damages. *Id.* at 1246-47.

These cases clearly illustrate that the primary holding of *Gasoline Products* (that a correctiy determined issue need not be tried again) is not made inapplicable by the mere fact that a case involves complex contracts and lost profits damages. *Firestone*, 769 F.2d at 1480; *Center Chemical*, 392 F.2d at 291. Even if it was, where there is a properly resolved tort claim the issue of liability remains settled, and a new trial limited to damages is appropriate. *Hadra*, 632 F.2d at 1246. There are many other cases standing for the same or a similar proposition as these cases. *See* Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* §2814 at 150 (stating that "[p]erhaps the most common example [of circumstances under which partial new trial has been found a proper remedy] is the grant of a new trial limited to damages when liability has been properly determined," and listing nearly three full pages of annotations.)

In the present case, the liability issue has been properly determined, as the lower courts' opinions indicate. There is no need for a new trial on all issues. Even if it were found that all breach of contract cases are automatically ineligible for partial trial treatment, partial trial would still be proper in the present case because there is a correctly resolved tortious interference claim as well. Therefore, in accordance with *Gasoline Products* and its progeny, and in the interests of justice and judicial economy, a grant of a new trial should be restricted to the issue of damages.

B. In the alternative, this Court may decide to reinstate the jury's verdict.

While the district court, upon finding error, had no other option but to grant a new trial on the issue of damages, this Court does have another option: it may reinstate the jury's verdict. In *Perkins v. Standard Oil Company of California*, 395 U.S. at 650 (1969), the Court did so, having determined that there was no need to prolong the litigation any further.

This Court would be justified in taking a similar course of action with this case. In this case, the trial court found the damages evidence presented by COT's expert witness to be sufficiently well-grounded up until 1992, when COT was forced to quit the contract due to the willful misconduct and intentional interference of AT&T. App. 60-61. It does not make sense that evidence and methods deemed acceptable up until a certain point should suddenly become unacceptable because the conduct that brings about the damages has reached critical mass. Rather, as in the rule in Oregon and generally, AT&T should have been held liable for the reasonably foreseeable consequences of its wrongful acts. *VonRavensberg v. Houck-Carrow Corp.*, 60 Or. App. 412, 653 P.2d. 1297 (1982); 45 Am. Jur. 2d *Interference* § 57 (1969).

Moreover, as previously noted, the trial court judge himself conceded that "[i]f an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand." App. 48. Because the trial judge did err by granting judgment as a matter of law in violation of the Seventh Amendment (and on the basis of a truncated record, *infra* part II) this Court may find it appropriate to conserve judicial resources by simply reinstating the properly arrived at 1994 jury verdict. *See also Montgomery Ward*, 311 U.S. at 250 (noting that the very

purpose of allowing decision on a motion for directed verdict to be postponed until after a verdict has been returned is to speed litigation and prevent unnecessary retrials).

II. A COURT SHOULD NOT BE PERMITTED TO ENTER JUDGMENT AS MATTER OF LAW BASED ON A POST-TRIAL TRUNCATED RECORD, SINCE DOING SO UNFAIRLY TAKES ADVANTAGE OF A PARTY'S JUSTIFIABLE RELIANCE.

It is a well established rule that a motion for judgment as a matter of law does not raise questions relating to admissibility of evidence. *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358 (CA8 1973) (quoting *Townsend v. United States Rubber Co.*, 74 N.M. 206, 209, 392 P.2d 404, 406 (1964) *overruled on other grounds by Rhein v. ADT Automotive, Inc.*, 930 P.2d 783, 789 n. 3, 122 N.M. 646 (1996)); *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1344 (CA6 1992) (quoting *Townsend*). This rule is necessary to prevent a party from suffering unfair reliance and prejudice where the court admits that party's evidence at trial, but later determines the evidence should not have been admitted and accordingly truncates the record. *Midcontinent*, 471 F.2d at 359; *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 696 (CA11 1993). Judgment as a matter of law based on the truncated record would deny the party any opportunity to introduce additional evidence. *Jackson*, 980 F.2d at 696. Therefore, it has been determined that the proper procedure in such a situation is to grant a new trial on the issue of damages. *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1189 (CA4 1990).

The trial court erred when it considered the admissibility of the testimony by COT's expert in ruling on AT&T's motion for judgment as a matter of law. *See, e.g.,*

Midcontinent, 471 F.2d at 357. COT relied on the initial determination that the evidence was admissible, and COT was unfairly prejudiced when it was denied the opportunity to introduce additional evidence as a result of the court's grant of judgment as a matter of law. The court should have granted a new trial on the issue of damages.

A. It was error for the District Court to enter judgment as a matter of law based on the admissibility of COT's expert testimony.

Prior to the Ninth Circuit's decision in the present case, every circuit that had ruled on the question of whether a trial court may enter judgment as a matter of law on the basis of a truncated record had answered in the negative. This includes the Eighth Circuit (*Midcontinent*, 471 F.2d at 359), the Eleventh (*Jackson*, 980 F.2d at 696), the Sixth (*Douglas*, 956 F.2d at 1344), the Fourth (*Persinger*, 920 F.2d at 1189), and the Fifth (*Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (CA5 1985)). Because the Ninth Circuit failed to logically differentiate these cases and the legal principles upon which they rest from the present case, the courts of the Ninth Circuit should be brought into conformity with those of the other circuits in being prohibited from granting judgment as a matter of law on the basis of a truncated record.

1. The Eighth Circuit properly stated the applicable rule in this context, and logically concluded that it prohibits granting judgment as a matter of law on the basis of a truncated record.

The Eighth Circuit was the first circuit to rule directly on the permissibility of granting judgment as a matter of law on the basis of a truncated record. *Midcontinent*, 471 F.2d at 359. In *Midcontinent*, plaintiff's broadcasting station was destroyed

by defendant's airplane. *Id* at 358. After the parties stipulated to the amount of damages, the existence and amount of lost profits was the sole issue remaining at trial. Plaintiff relied almost exclusively upon the expert testimony of one witness to prove lost profits. The trial court admitted the testimony over defendant's objection that plaintiff had not established an adequate factual foundation for the testimony. After the jury awarded the plaintiff $500,000, however, the court reversed itself, deciding that it was mistaken in admitting the expert testimony. Judgment as a matter of law was entered. *Id.*

On appeal, the court for the Eighth Circuit stated the general rule that a motion for judgment as a matter of law does not raise questions relating to admissibility of evidence. *Id.* (quoting *Townsend*, 74 N.M. at 209, 392 P.2d at 406). Instead, in considering such a motion the evidence must be taken as it existed at the close of trial. *Id.* at 359. Applying this rule to the case before them, the court determined that it "had no alternative but to grant a new trial rather than [judgment as a matter of law]." *Id.* (quoting *Townsend*, 74 N.M. at 210, 392 P.2d at 407, *overruled by Rhein,*, 930 P.2d at 789-90 nn. 3 and 4, 122 N.M. 646 (1996) (holding that where a lower court grants judgment as a matter of law based on the evidence or credibility of witnesses, new trial is an improper remedy; the proper remedy is reinstatement of the jury verdict).

In the present case, the issue of lost profits is similarly in issue. Like the plaintiff in *Midcontinent*, COT relied primarily on one expert's testimony to establish the extent of those lost profits. App. 42. The district court admitted the testimony over AT&T's objection during the course of the trial (App. 53), and the jury awarded COT damages. The district court then decided that it "should have stricken this evidence" and entered judgment as a matter of law. App. 61, 62. In light of the rule stated in *Midcontinent*, this was error.

The Ninth Circuit Court of Appeals also erred in allowing the judgment as a matter of law to stand. The court acknowledged the basic rule of *Midcontinent*, stating that "it is true... that a trial judge must consider all the evidence submitted in ruling on a motion for judgment as a matter of law." *Central Office Tel. v. American Tel. and Tel. Co.*, 108 F.3d 981, 993 (CA9 1997). The appellate court claimed, however, that the district court had satisfied this requirement since it had "considered the entirety of the testimony of COT's expert, found that he should not have allowed the post-contract period evidence to be submitted, then reduced the jury's damage award." *Id.*

Such a sequence is explicitly disallowed by *Midcontinent*, as well as by the other cases discussed herein. These cases do not require merely that the trial court initially consider the evidence as a whole, after which it is free to pass on the admissibility of that evidence and ultimately render a judgment as a matter of law if it finds that the evidence "should not have [been] allowed." If this was all that was required, the rule stated in *Midcontinent* and restated by the Ninth Circuit would be reduced to nothing.

Rather, these cases hold that a motion for judgment as a matter of law *at no time* raises questions relating to admissibility. *See, e.g., Midcontinent*, 471 F.2d at 357. Only then does it make any sense to have the rule at all. Thus, the district court judge was in error when, in considering defendant's motion for judgment as a matter of law, he allowed his determination "that he should not have allowed the post-contract period evidence to be submitted" to play a role in his ruling. App. 24.

In the present case, the Ninth Circuit explicitly recognized both the general rule that underlies the prohibition

against granting judgment as a matter of law based on a truncated record, and the fact that the district court engaged in such prohibited action. App. 24. Logic and authority mandate that the Ninth Circuit should therefore have found the actions of the district court impermissible. Its failure to do so places the Ninth Circuit in stark opposition to sister circuits.

2. Other circuits (excluding the Ninth) have been in accord with the ruling of the Eighth Circuit.

Since *Midcontinent*, four other circuits have reached the same logical conclusion as the Eighth Circuit, finding that judgment as a matter of law may not properly be entered on the basis of a truncated record. *See, e.g., Jackson*, 980 F.2d at 696 (CA11); *Douglas*, 956 F.2d at 1344 (CA6); *Persinger*, 920 F.2d at 1189 (CA4); *Dixon*, 754 F.2d at 580 (CA5). Only the Ninth Circuit has reached a different conclusion.

While the specific facts of the cited cases differ, they all share certain elements. Each involved the admission at trial of key evidence which the judge determined post-trial should not have been admitted, and in three out of the four cases the evidence in question was expert testimony. In each, the jury awarded damages, and the judge reduced those damages by granting judgment as a matter of law. And in each, the reviewing circuit court found that the district court judge was in error because he had violated the rule that judgment as a matter of law may not be entered on the basis of a truncated record.

In the present case, the pertinent elements are all present, except for the holding. At trial, the district court admitted the testimony of COT's expert. App. 42-43. Post trial, the court determined that it should have stricken that testimony, and accordingly reduced the jury award via judgment as a matter of law. App. 62, 65. On appeal, the Ninth Circuit

began by accepting the same premise as the other circuits (that a judge must consider all admitted evidence in ruling on a motion for judgment as a matter of law), but nonetheless reached a different result. App. 24.

The court's attempt to justify that different result is flawed. The Ninth Circuit held that a trial judge could fulfill his duty to consider all the evidence by considering it in the first instance, then deciding that he should never have considered it at all. App. 24. On the basis of that decision, he would then be free to enter judgment as a matter of law. App. 24. Clearly, were this approach adopted, the decisions from all the other circuits regarding this issue would be incorrect. After all, there can hardly be any doubt that the trial judges in those cases (and in any imaginable case) first considered all the evidence before deciding to strike some portion of it.

This Ninth Circuit approach should be rejected, as it turns the rule upon which it supposedly rests into nothing more than a decorative string of words that ultimately serves no purpose. The five other circuits that have considered this issue have adopted the more logical approach, an approach that shows proper deference to the rule of law.

B. Fairness demands that COT be granted a new trial on the issue of damages.

While legal rules are important, they must be clearly justifiable in terms of purpose and policy to be deserving of deference. The rule that judgment as a matter of law should not be entered on the basis of a truncated record is such a rule. It serves to ensure that all parties receive a fair trial, and that no party should be unfairly prejudiced where avoidable. In the present case, COT has been unfairly prejudiced as a result of the failure of the courts to properly implement and abide by the above stated rule.

All of the circuits that have ruled on this issue (save the Ninth) have cited policy reasons that support their decision. In *Midcontinent*, the Eighth Circuit explained that when a trial court admits a party's expert testimony, then post-trial determines that the evidence should have been stricken, that party is put in a position of unfair reliance. *Midcontinent*, 471 F.2d at 359. That reliance stems from the party's properly held belief that its evidence is admissible, and that further foundation or other evidence on the issue is unnecessary. *Id.*

In *Douglas*, the Sixth Circuit cited to *Midcontinent* and quoted it concerning the concept of "unfair reliance" in supporting its own conclusion that "it is wholly improper for a district judge to ignore evidence admitted at trial from its consideration in granting [judgment as a matter of law]." *Douglas,* 956 F.2d at 1343-44. The Fifth Circuit also quoted and expressed agreement with *Midcontinent* in *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (CA5 1983).

In *Persinger*, the Fourth Circuit held that there was reliance even where the district judge had expressed "great doubts" about the admissibility of a witness's expert testimony but had declared that, "I have let it in and I am not going to strike it at this time." *Persinger,* 920 F.2d at 1187, 1189. Furthermore, the appellate court held that the district judge's post-trial determination of inadmissibility "clearly prejudiced" the plaintiff since it left him "no opportunity to present additional evidence." *Id.* at 1189.

Finally, in *Jackson*, the Eleventh Circuit also noted the fact of reliance, and that it denies the relying party the opportunity to introduce new evidence. *Jackson*, 980 F.2d at 696. Moreover, the court stated that reliance was particularly great where the defense objected on several occasions to the

admission of the testimony and the district court ruled in plaintiff's favor each time during the trial. *Id.*

In the present case, COT relied heavily on the testimony of its expert, Mr. Hainline, to establish the existence and extent of lost profits. Although the district court noted that "AT&T moved to strike Hainline's damages analysis on a number of grounds," the court admitted the testimony during the trial. App. 53. COT's justifiable reliance was still further induced when COT's counsel offered to support Mr. Hainline's expert testimony by calling another witness, but was made to believe it unnecessary by the district court's ruling at trial that COT's damages analysis was admissible even without this additional testimony. App. 81-86. Moreover, even after trial the court found that Hainline's analytical methods were acceptable, at least through 1992 when COT was driven to quit the contract by AT&T's willful misconduct and intentional interference. App. 61.

The district court's post-trial conclusion that "Hainline is not an expert in the complex field of communications technology" (App. 52-53) and the resulting grant of judgment as a matter of law reducing much of the damages award came too late for COT to remedy through the introduction of new evidence. Therefore, judgment as a matter of law is inappropriate in the present case.

The appropriate remedy is a new trial. Only a new trial will allow COT the opportunity to introduce new and/or different evidence on the issue of damages. The conclusion of the Tenth Circuit in *Firestone* is appropriate here. 769 F.2d at 1480. In that case (involving a damages claim for breach of contract spanning sixteen years), the court held: "In view of the complexity of the damages evidence and the difficulty of proof, we believe that the interests of justice require a new trial as to

the proper amount of damages, rather than [judgment as a matter of law]." *Id.*

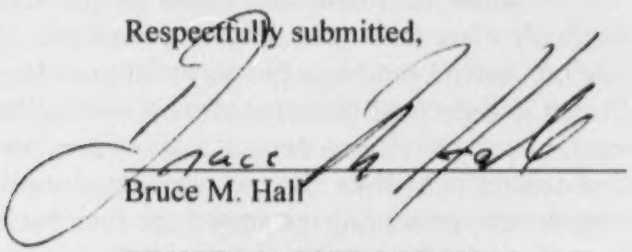
While not explicitly stated in the cases cited, it is implicitly clear that again the policy concerns embodied in the Seventh Amendment right to a jury trial loom large. If the Ninth Circuit is right (and the other circuits wrong) that a court may induce a party's reliance through admission of his evidence, then turn around and strike that evidence from consideration post-trial, thereby preventing the party from ever making his case to a jury, then the Seventh Amendment will have suffered a fatal blow. The Seventh Amendment is the protector of the right to trial by jury: and it is this court which must, in turn, protect the Seventh Amendment.

The rule that all evidence must be considered in ruling on a motion for judgment as a matter of law, and the policy of fairness that both supports and is supported by this rule, mandate that the grant of judgment as a matter of law be reversed in the present case. In its place, a new trial should be ordered, or, if this Court prefers, it may put an end to this litigation and simply reinstate the original jury verdict. *See supra,* part I.B at 12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CENTRAL OFFICE TELEPHONE, INC.,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTRAL OFFICE TELEPHONE, INC., *Plaintiff-Appellee-Cross-Appellant,* v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *Defendant-Appellant-Cross-Appellee*	Nos. 94-36116, 94-36156 D.C. No. CV-91-1236-JAJ OPINION

Appeals from the United States District Court
For the District of Oregon
John A. Jelderks, Magistrate Judge, Presiding

Argued and Submitted
July 8, 1996—Portland, Oregon

Filed February 26, 1997

Before: Warren J. Ferguson and Melvin Brunetti, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge King; Dissent by Judge Brunetti

SUMMARY

Business Law/Contracts

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*The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that the filed-tariff doctrine does not apply to a contract between a communications common carrier and a reseller for provisioning of services and billing.

In tariffs filed with the Federal Communications Commission (FCC), appellant American Telephone and Telegraph Company (AT&T) set forth the rates charged for its long distance services, including "Software Defined Network" (SDN). In addition to rates, the SDN tariff limited AT&T's liability for all but wilful misconduct.

Appellee Central Office Telephone, Inc. (COT), a telecommunications reseller, entered into an agreement with AT&T for SDN services. COT selected the "Multilocation Billing" (MLB) option, under which AT&T billed resellers' customers to reflect a share of the SDN discount designated by the reseller. AT&T told COT that the service would be provisioned in four or five months, and that afterward, additional orders would be provisioned within 30 days.

AT&T conducted tariff pricing promotions offering discounts and fee waivers to new SDN customers. Orders from resellers increased to the point that AT&T experienced delays in provisioning SDN and billing customers. AT&T limited the number of new SDN customers and made alternative arrangements for servicing reseller customers.

When COT began selling SDN services, it immediately experienced provisioning delays and billing problems, including "suppressed billing." Suppressed billing occurred when a location was on the SDN network, but had an incomplete installation configuration that allowed its phone usage billing record to accumulate until the installation was complete. At that point, the customer would be billed for past unbilled calls,

sometimes up to a year after they were made. Another billing problem allowed COT customers to receive 100% of the SDN discount instead of the 50% COT had designated.

COT changed from MLB to another billing method and continued to use SDN. However, COT was unable to meet its contractual usage commitment and terminated the contract with one and one-half years remaining on its term.

COT sued AT&T, alleging state-law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract. COT contended that AT&T's failure to provision SDN orders in a reasonable manner, failure to properly allocate discounts between COT and its customers, failure to offer functional services, and other errors in performance constituted breach of contract.

The state-law claims were based on COT's contention that the contracts with AT&T did not constitute the ordering of long-distance services pursuant to the tariff, but voluntary contracts for sale and purchase of such services. COT alleged that the contracts included all the understandings between COT and AT&T derived from service brochures and conversations with AT&T representatives.

COT asserted that AT&T breached the state-law covenant of good faith and fair dealing by taking actions that undermined the purpose of the contract--to obtain telecommunication services and resell them at a profit. COT's tortious interference claim alleged that because COT had promised certain benefits of SDN to its customers and AT&T provided competing services, any violation of AT&T's contractual duties also constituted tortious interference with COT's relationship with its customers. COT also contended that because AT&T's conduct--running the promotions when it did not have adequate provisioning capability--was wilful, consequential damages were appropriate.

AT&T counterclaimed for over $1 million in unpaid charges, and as a defense alleged that COT's state-law claims were preempted by the filed-tariff doctrine.

A magistrate judge (MJ) rejected AT&T's preemption defense and denied its motion for summary judgment on its counterclaim and on all of COT's claims, except one for negligent misrepresentation. The MJ concluded that the filed-tariff doctrine did not apply because COT was not disputing the filed tariff's reasonableness or validity, but complaining about the manner in which AT&T provided the services for which COT had contracted.

The MJ also rejected AT&T's assertion that there was no substantial evidence of its wilful misconduct, and denied its motion to exclude a lost profits study prepared by COT's damages expert. The MJ also denied COT's request to introduce evidence of AT&T's financial condition in connection to its claim for punitive damages.

A jury returned a verdict for COT of $13 million on its contract and intentional interference claims, and against AT&T on its counterclaim for unpaid tariff charges. The MJ granted AT&T's motion for partial judgment as a matter of law (JMOL) and cut off COT's damages as of the date of its termination of the contract.

On AT&T's motions for a new trial and remittitur, the MJ ruled that the filed-rate doctrine did not preempt COT's state-law claims as a matter of law. The MJ entered a judgment awarding COT $1.15 million. Both sides appealed.

[1] Communications common carriers must file tariffs with the FCC. The filed-tariff (or filed-rate) doctrine forbids a regulated entity from charging rates for its services other than those filed with the appropriate regulatory authority. The filed

rate of the carrier is the only lawful rate it may charge, and is strictly construed. The filed rate governs the legal relationship between the shipper and the carrier.

[2] The filed-rate doctrine has two purposes: to preserve the regulating agency's authority to determine the reasonableness of rates, and to insure that regulated entities charge only those rates that the agency has approved or been made aware of. Because this case did not involve rates or rate-setting, but rather the provisioning of services and billing under contracts, the filed-rate doctrine did not apply.

[3] Assuming that COT's claims were covered by the filed-rate doctrine, it could not apply to any of COT's claims with regard to billing or provisioning. The agreed facts stated that COT chose MLB and that it was not covered by the tariff. AT&T's expert testified that the provisioning of SDN was not covered by the tariff.

[4] The MJ was not in error by failing to instruct the jury that the only issue was whether AT&T violated its tariff through wilful misconduct. Likewise, the MJ did not err in denying AT&T's motion for JMOL for unpaid tariff charges. [5] Giving that AT&T could not rely on its filed-rate argument to shield itself from COT's claims, and that COT's evidence suggested that AT&T did not bill COT properly, it was not error for the MJ to deny AT&T's motion for JMOL on its counterclaim.

[6] Determination of damages is a question of fact that will not be disturbed unless it is clearly unsupported by the evidence. [7] Oregon law states that the essential ingredient of proof of lost profits to a reasonable certainty is supporting data. Expert testimony can provide a sufficient factual basis for an award of lost profits. [8] The MJ found that COT's expert's study was sufficiently grounded in objectively verifiable facts and reasonable assumptions to support an award of lost profits up to

COT's termination of SDN sales. The MJ did not abuse his discretion in allowing the testimony to go to the jury.

[9] The MJ limited the damages award to the contract period because determining damages beyond that was too speculative, not because damages should encompass only the term of the contract. Under Oregon law, lost profit damages must be proven to a reasonable certainty. [10] It could not be said that the MJ applied an absolute certainty standard by finding that experts must have some verifiable basis for their opinions.

[11] Although the court must not reweigh the evidence, the court must view it in the light most favorable to the non-moving party to determine if the verdict is supported by substantial evidence. As to both factors, the MJ could find no basis for the expert's opinions other then the expert's assumptions. [12] Given the flaws identified by the MJ, it did not appear that AT&T was not entitled to JMOL on COT's post-contract claim.

[13] On a motion for a new trial, a trial court that finds a verdict excessive may either order a new trial or deny the motion conditional on the party accepting a remittitur. However, the MJ did not reduce the award based on AT&T's motion for a new trial, but on its motion of JMOL. The Federal Rules of Civil Procedure allow a court to set aside a jury verdict and enter a JMOL.

[14] A trial judge must consider all the evidence submitted on a motion for JMOL. The MJ considered the entirety of the testimony of COT's expert, found that he should not have allowed the post-contract evidence to be submitted, and reduced the damages award. The MJ did not grant JMOL for AT&T based on a truncated trial record.

[15] Under Oregon law, punitive damages are available when there is evidence of malicious or wanton conduct. If the judge determines that there is evidence of malice, the assessment of damages is committed to the jury's discretion. Oregon courts have held that punitive damages may be awarded for tortious interference with a business relationship if actual damages are awarded on the same claim. [16] The MJ erred in not instructing the jury on punitive damages. It was therefore appropriate to remand for a new trial on the issue of punitive damages.

Judge Brunetti dissented, expressing the belief that the filed-rate doctrine preempted COT's state-law claims.

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OPINION

KING, District Judge:

American Telephone & Telegraph Company ("AT&T") appeals the judgment of the magistrate judge, following a three-week jury trial, awarding Central Office Telephone, Inc.

("COT") $1.154 million in damages, and denying AT&T's claim for over $1 million in unpaid federally tariffed charges for long distance services, under the Federal Communications Act of 1934, ("Communications Act" or "Act") 47 U.S.C. § 153(h). COT's action against AT&T alleged breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference with contract. COT cross-appeals the magistrate judge's decision not to allow the jury to consider an award of punitive damages, as well as the magistrate judge's post-trial order reducing the original jury verdict of $13 million in compensatory damages in favor of COT.

COT, a reseller of long distance services, entered into a contract with AT&T for Software Defined Network ("SDN") services, which COT later resold to its customers. AT&T is a provider of long distance services and is classified as a common carrier under the Communications Act, 47 U.S.C. § 153(h), and therefore, its long distance services are subject to the requirements of §203 of the Act, which contains statutory filed tariff requirements.[1] 47 U.S.C. § 203.

The tariffs filed with the Federal Communications Commission ("FCC") by AT&T set forth the rates for each of its long distance services. One of the services provided by AT&T is SDN, a long distance service which provides a physically separate long distance network for a customer's long distance

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[1] Among these are § 203(a)'s requirement that all common carriers (except connecting carriers) file a tariff showing all charges for itself and its connecting carriers' services, and the classifications, practices and regulations affecting such charges with the FCC, and § 203(c)'s prohibitions against charging different rates for services than those named in the filed schedules, and against "extend[ing] to any person any privileges or facilities, . . . or employ[ing] or enforc[ing] any classifications, regulations, or practices affecting such charges, except as specified in the schedule." 47 U.S.C. § 203(c).

service. In addition to describing rates for the service, the SDN tariff limits AT&T's liability for all but wilful misconduct.

SDN customers make large volume commitments, and therefore, SDN rates are lower than rates for other AT&T services. Because the set-up of an SDN network is complex, the tariff provides for an up-front installation charge to the customer. Once SDN is set up, the customer may add new locations or drop old ones form the network.

SDN has several characteristics attractive to switchless resellers[2] such as COT. It accommodates switched access, allowing resellers to offer the service to its customers who are generally small businesses or residences. Furthermore, Multilocation Billing ("MLB"),[3] added by AT&T in 1989, allows volume discounts to be apportioned between an SDN customer and individual locations on its network, in a proportion chosen by the customer. Under this option, AT&T sends bills directly to the reseller's customers, however, the reseller remains responsible for all payments. Another billing option offered is the Location Account Billing Option ("LABO"), under which AT&T sends bills to each location at the discount rate, and each location is responsible for payment.

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[2] Switchless resellers are firms that purchase "bulk" long distance services from carriers and sell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of AT&T and the end users are the customers of the resellers.

[3] AT&T contends that MLB is a tariffed service. However, in ruling on AT&T's motion for judgment as a matter of law, the magistrate judge held that "[MLB], a subject of considerable contention in this dispute, is an untariffed service that is subject to a separate agreement between the parties."

AT&T also instituted two tariffed pricing promotions in 1989 which are attractive to resellers. Expanded Volume Pricing plans ("EVPs"), offering additional discounts from the basic SDN rates for customers making large usage and duration commitments, and another promotion which waived the installation charges and per-location installation charges for customers making multi-year commitments, subject to penalties for early termination.

Following the 1989 changes in SDN service, orders from resellers increased, and AT&T experienced delays in provisioning SDN, especially switched access service. Billing problems also occurred, most notably, "suppressed billing"[4] which resulted in customers not receiving bills for calls for up to one year after the calls were made.[5]

In light of the problems with SDN, AT&T limited the number of new SDN customers. AT&T also transferred servicing of all reseller customers to the Channel Development and Operations Center ("CDOC").[6] The CDOC was the successor to the Carrier Service Center, which had previously done business with AT&T's reseller customers.

COT placed orders for SDN, after COT's president became aware of SDN in 1989, and contacted AT&T's Portland office

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[4] Suppressed billing occurs when a location is on the SDN network but does not have a "billing guide" in place to match its phone usage billing record. The billing system therefore has nowhere to register the call and the calls are lumped into a "unbilled" toll group until the billing guide is set up. Once the guide is set up, the customer is billed for past unbilled calls.

[5] COT was still experiencing billing problems in 1992 when it filed suit.

[6] The CDOC has two locations, one in Pleasanton, California, the other in Piscataway, New Jersey.

regarding the service. On October 30, 1989, COT signed an agreement for SDN service, and selected Multi Location Billing. AT&T represented to COT that the service would be provisioned in four to five months, and thereafter, additional orders within 30 days. In February, AT&T advised COT that new orders would take 45 to 90 days due to provisioning problems, and informed COT that another AT&T service, Multi Location Calling Plan ("MLCP") would serve COT's customers until they were provisioned onto SDN.

COT began reselling SDN services in April 1990, and immediately experienced problems with the network including provisioning delays and suppressed billing. COT also experienced an additional billing problem: COT's customers received 100% of the discount instead of the 50% COT had selected, because COT was billed under the LABO billing option rather than the MLB billing COT had selected. COT continued to experience problems with provisioning and billing, and in October 1990 COT switched from MLB billing to Network Billing, under which AT&T sent COT a single bill which COT was responsible for paying. COT then sent individual bills to its customers.

Although COT continued to sell SDN, it was ultimately unable to meet its usage commitment for the first period in which it was applicable. In addition, AT&T claimed that COT had failed to pay nearly $200,000 in billing. On September 21, 1992, COT's president informed AT&T that COT was terminating its contract as of September 30, 1992, with 1 1/2 years remaining in the contract.

COT filed suit on November 27, 1991. COT ultimately pursued three state law claims at trial: breach of contract, breach of implied covenant of good faith and fair dealing, and

tortious interference with contract.[7] COT's state law claims were based on COT's allegation that the contracts entered into with AT&T did not constitute the ordering of long distance pursuant to the requirements of AT&T's tariff, but rather constituted voluntary contracts in which COT agreed to purchase, and AT&T agreed to provide long distance services. COT also claimed that the contracts encompassed more than the written orders, and included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives.

COT argued that AT&T's failure to provision SDN orders in a reasonable manner, failure to properly allocate discounts between COT and its customers under Multilocation Billing, failure to offer SDN and MLCP services which were functional for COT, failure to initially credit MLCP usage to SDN, failure to provide timely call detail to COT and its customers, and failure to afford COT international calling capability at a reasonable completion rate, as well as a requirement that COT post a deposit, and AT&T's provisioning of calling card capabilities under Network Remote Features rather than an SDN calling card bearing both COT's and AT&T's logo, constituted breach of contract.

COT also claims that AT&T breached its state law implied duty of good faith and fair dealing by taking actions that undermined the purpose of the contract, which was to obtain services and resell them at a profit. COT's tortious interference with contract claim alleged that because COT had promised certain benefits of SDN to its customers, and because AT&T provided competing services, any violation of AT&T's

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[7] Because the magistrate judge treated the first two claims as one breach of contract claim, COT states that only two claims were before the jury.

contractual duties constituted tortious interference with COT's relationship with its customers.

Furthermore, COT alleged that AT&T's conduct was wilful and therefore consequential damages could be awarded under the terms of its tariff. COT claimed the wilful conduct consisted of running a promotion for SDN when AT&T did not have the capability to provision COT and other resellers to the CDOC. COT also argued that improper purpose could be inferred from certain internal AT&T documents discussing proposed SDN changes.

At three stages of the proceedings below,[8] AT&T asserted that COT's state law contract and tort claims were preempted by the filed tariff doctrine of § 203 of the Communications Act. The magistrate judge rejected this claim and denied AT&T's Motion for Summary Judgment as to its counterclaim and all of COT's claims, excepting COT's negligent misrepresentation claim. *Central Office Tel. Co., Inc. v. AT&T*, Civ. No. 91-1236-JE (E.D. Or. 1991). In denying AT&T's motion for summary judgment on its counterclaim and on COT's claim for breach of contract, the magistrate judge found AT&T's reading of the filed-rate doctrine too broad. The magistrate judge also found

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[8] Before trial, AT&T moved for partial summary judgment on its counterclaim for unpaid tariffed charges, and for summary judgment on the then remaining seven state law claims made by COT in its Amended and Supplemental Complaint. COT disputes that AT&T specifically raised the issue of preemption. However, AT&T did argue that "the filed tariff doctrine requires entry of judgment in favor of a carrier, even though its customer has state law claims related to the reasonableness of the tariff rates or charges." Def. Mot. in Supp. of Mot. for Summ. Jmt. at 22. After trial, AT&T moved for a directed verdict on COT's breach of contract and breach of implied covenant claims, arguing, *inter alia*, that COT's state law contract claims were barred by the filed tariff doctrine and preempted by the Communications Act. AT&T's Mem. in Supp. of Mot. for Directed Verdict. AT&T reiterated this argument in its Motion For Judgment as a Matter of Law following the jury verdict.

that because COT was not disputing the filed-rate's reasonableness or validity, or that of the tariff in general, but rather was complaining about the manner in which AT&T provided the services for which COT contracted, the filed-rate doctrine did not apply *Id.* at 16.

The magistrate judge also rejected AT&T's argument that there was no substantial evidence that any of its challenged conduct constituted wilful misconduct within the meaning of its tariff. In addition, AT&T moved to exclude a lost profits study prepared by COT's damage expert, which motion was denied. COT requested that it be allowed to present evidence of AT&T's financial condition in support of its claim for punitive damages, however, the court also denied this request.

The jury returned a verdict of $13 million in favor of COT on its breach of contract and intentional interference claims, and also in favor of COT on AT&T's counter-claim for unpaid tariff charges. Judgment was entered on July 1, 1994. AT&T then moved for judgment as a matter of law, for a new trial or for remittitur. The court denied AT&T's motions for new trial and remittitur, and ruled as a matter of law that the filed-rate doctrine did not preempt COT's claims. The magistrate judge also granted AT&T partial judgment as a matter of law and cut-off COT's damages for the period after September 1992, finding there was no competent evidence for this period. The magistrate judge then entered an amended judgment awarding COT $1,154,000. COT moved, pursuant to Fed. R. Civ. P. 59(c), to alter the amended judgment on the grounds that the court had relied on the wrong exhibit when it calculated pre-September damages. The court denied the motion.

On appeal, AT&T reiterates its contention that COT's state law claims are preempted by the Communications Act. COT counters that AT&T failed to provide untariffed services and engaged in wilful misconduct, and therefore, the filed-rate

doctrine does not apply and its claims are not preempted. Therefore, it must initially be determined whether the magistrate judge was correct in holding as a matter of law that the filed-rate doctrine did not apply to COT's claims. We review a district court's decision regarding motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 de novo. *Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir. 1993).

[1] AT&T argues that statutory filed tariff requirements preempt any state law claims that a carrier has expressly or impliedly agreed to provide a customer with services that are better or different from that required by the carrier's filed tariffs. Under 47 U.S.C. § 203(a), communications common carriers must file tariffs with the FCC. The tariff-filing requirements were taken from the Interstate Commerce Act ("ICA"), and the Supreme Court has stated that, like rate-filing under the ICA, tariff-filing under the Communications Act is "Congress's chosen means of preventing unreasonableness and discrimination in charges; . . . the tariff-filing requirement is the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, _____ U.S. _____, 114 S.Ct. 2223, 2231 (1994). The filed tariff doctrine (or filed-rate doctrine) forbids a regulated entity form charging rates for its services other than those filed with the appropriate regulatory authority. *Arkansas Louisiana Gas Co., v. Hall*, 453 U.S. 571, 577 (1981). The filed-rate of the carrier is the only lawful rate a carrier may charge, and it is strictly construed. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) (interpreting the filed-rate provisions of the ICA); *MCI*, 114 S.Ct. at 231. Furthermore, "the filed-rate governs the legal relationship between the shipper and the carrier." *Maislin*, 497 U.S. at 126.

AT&T argues that a long line of Supreme Court Cases establish that the filed-rate doctrine precludes a carrier from

entering into "side-deals" which give preference to certain customers and are not defined in the filed-rates.[9] COT argues that AT&T cases establish that a carrier may not provide special or extra services to certain customers that are not defined in the tariffs, such that the customer actually pays a lower rate. Furthermore, COT argues that it paid the same rates as AT&T's corporate customers and that its claims do not involve the tariff rates.

[2] The filed-rate doctrine has two purposes: (1) to preserve the regulating agency's authority to determine the reasonableness of rates; and (2) to insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992). Because this case does not involve rates or rate-setting, but rather involves the provisioning of

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[9] AT&T cites several cases in support of this argument including: *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155 (1912) (holding a contract between a carrier and a shipper, under which the shipper guaranteed racehorses would be shipped on certain train, invalid because it was not published in the tariffs and gave one shipper an advantage not available to all), *Davis v. Cornwell*, 264 U.S. 560 (1924) (holding agreement to provide a shipper a number of railroad cars on a specified day invalid because the tariff did not provide for specification of shipping date); *Atchison v. T.&S.F. Ry. v. Robinson*, 233 U.S. 173 (1914) (holding an agreement to provide expedited shipping not enforceable because it was not contained in carrier's tariff). As pointed out by COT and stated explicitly in *Chicago*, the agreements cited in these cases were for special expedited shipping services for which the customer would have been expected to pay a higher rate. The Court thus found that the special service should have been included in the tariff and made available to all. 255 U.S. at 165. COT contends that AT&T provided special services to others, but denied them to COT. There is no allegation by either AT&T or COT that COT did not pay the same rates as others who sought the same services from AT&T, nor does AT&T contend that COT should have paid higher rates than those in the tariffs.

services and billing under several contracts, the filed-rate doctrine does not apply.[10]

[3] However, assuming arguendo, that COT's claims are covered by the filed-rate doctrine, the filed-rate doctrine could not apply to any of COT's claims with regard to billing or provisioning. As noted by the magistrate judge, Multi Location Billing, the option originally chosen by COT, was not covered by the tariff. AT&T's tariff expert testified at trial that billing procedures were not covered by AT&T's tariffs. In addition, the mutually agreed upon facts given in the jury instructions state that COT chose MLB, and that it was not covered by the tariff. Furthermore, AT&T's tariff expert also testified at trial that the provisioning of SDN services was not covered by the tariff. Therefore, the filed-rate doctrine could not apply to any of

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[10] In *Wegonland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994), the Second Circuit noted that there are two corresponding interests involved with the filed-rate doctrine which have turned up in Supreme Court decisions: the justiciability of determining reasonable rates, and the potential discrimination in rates between ratepayers. Both of these interests involve the payment of rates and do not refer to contractual obligations to provide services as AT&T contends. AT&T argues that the filed-rate doctrine does not only apply to rates, citing *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571-72 (1921). This case in fact involved two classes or rates. Messages sent at the lower rate were sent only once and provided for limited liability for messages not received. The other, was more expensive and provided that messages would be repeated. The court found that the limitation of liability was part of the rate because the customer accepted the risk of the message being wrongly transmitted by choosing the cheaper rate and having the message sent only once. The Court further found that allowing recovery of damages to those who chose a lower rate would create a preference over those who paid the higher rate to insure their message was transmitted correctly. *Id.*

COT's claims with regard to billing or provisioning, even if the doctrine could apply to other aspects of the SDN service.[11]

[4] Having determined that COT's claims are not preempted by the filed-rate doctrine, it follows that the magistrate judge was not in error, as AT&T asserts, by failing to instruct the jury that the only issue was whether AT&T violated its tariff through wilful misconduct. Likewise, the magistrate judge did not err in denying AT&T's motion for judgment as a matter of law for unpaid tariff charges owed by COT. AT&T maintains that the same errors of law which applied to its argument that COT's state law and contract claims were preempted by the filed-tariff doctrine require the reversal of the denial of its counterclaim. Previously, AT&T had argued that the filed-rate doctrine barred the application of equitable defenses against the collection of debts incurred pursuant to a tariff filed with the appropriate agency. *Maislin*, 497 U.S. 116 (1990).

The magistrate judge, however found that COT was not disputing the validity of the rates charged under the tariff, but rather, the accuracy of AT&T's calculations and AT&T's right to collect for services for which COT's customers were not accurately billed. Once again, AT&T bases its argument on the assumption that all rights between AT&T and COT are governed by the tariff. As already discussed, this is not the case.

[5] COT argues that AT&T failed to provide the services it was promised, including correct billing.[12] COT also argues that

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[11] In addition, AT&T's expert testified that the provisions of the tariffs do not apply to the relationship of AT&T to the reseller, but rather, only apply to the relationship between AT&T and the end user.

[12] The parties do not dispute that COT paid all charges owed after it took over billing for itself, following AT&T's inability to correctly bill COT's customers as promised.

the jury rejected the counterclaim based on the evidence it presented including testimony that COT paid all amounts owed for SDN service, as reflected in COT's records, that approximately $130,000 of alleged unpaid tolls resulted from incorrect AT&T billings and another $68,000-69,000 from unexplained charges, and evidence that AT&T's billing was flawed and showed wild fluctuations. Given that AT&T cannot rely on its filed-rate tariff argument to shield itself from COT's claims and that the evidence presented by COT suggests that AT&T did not properly bill COT, it was not error for the magistrate judge to deny AT&T's motion for judgment as a matter of law on its counterclaim.

In addition, AT&T maintains, as it did both during and after trial, that COT's failure to produce any competent evidence of damages is independent ground for reversal of the amended judgment, and that because the testimony of COT's damage expert should not have been admitted, the $1.154 million award should be reversed and judgment entered for AT&T.

Evidentiary rulings are reviewed for an abuse of discretion, and should not be reversed absent some prejudice. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995); *The Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443, 448 (9th Cir. 1994).[13]

[6] Initially, the parties disagree over whether state of federal law should apply when determining whether the evidence supports a claim for lost profits. AT&T argues that

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[13] AT&T asserts that the proper standard is de novo review, citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S.Ct. 189 (1995). However, the de novo standard enunciated in *Daubert* applies to scientific evidence under Fed. R. Evid. 702 and there is no indication that the standard is meant to apply to all expert testimony.

federal law should apply citing a Fifth Circuit case for this proposition. *University Computing Co. v. Management Science*, 810 F.2d 1396 (5th Cir. 1987). However, in *University Computing*, the court found that federal law determined the sufficiency of the evidence with reference to state substantive law on lost profits. *Id.* at 1396. In *Milgrad Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990), the defendant challenged damage awards as speculative and unsupported by the evidence. *Id.* at 710. This Court stated that the determination of damages was a question of fact which will not be disturbed unless it is clearly unsupported by the evidence. *Id.* The Court then laid out the test for lost profits under Washington State Law. *Id.*

[7] Oregon law states that the essential ingredient of proof of lost profits to a reasonable certainty is supporting data. *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 591 (Or. 1977). Expert testimony alone can provide a sufficient factual basis for an award of lost profits. *Milgrad*, 902 at 711.

[8] After reviewing in detail the method used by COT's expert to calculate lost profits, the magistrate judge, in his order denying in part and granting in part AT&T's motion for judgment as a matter of law, found that COT was not entitled to recover damages for the period following the termination of its contract with AT&T. However, he found that COT's damage expert's study was "sufficiently grounded in objectively verifiable facts and reasonable assumptions to support the jury's award of lost past profits up to COT termination of its SDN sales in September 1992." Thus referring to the standard for lost profits enunciated by the Oregon Supreme Court, the magistrate judge did not abuse his discretion by allowing the testimony to go to the jury.

[9] Additionally, COT makes several arguments concerning the errors made by the magistrate judge in limiting its damage

award. First COT argues that under Oregon Law, lost profits may be recovered for tort as well as contract actions, and therefore, the magistrate judge erred in limiting the damages to the contract period. The magistrate judge, however, limited the damage award to the contract period because he found that determining damages beyond that period was too speculative, not because he found that damages should only encompass the term of the contract. In reviewing the size of jury verdicts, the proper role of trial and appellate courts in the federal system is a matter of federal law. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 91977) (per curiam). The district court determines whether the jury's verdict is within the confines of state law. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disp., Inc.*, 492 U.S. 257, 279 (1989). Under Oregon law lost profits damages must be proven to a reasonable certainty. *Welch v. Bancorp Realty and Mortgage Trust*, 596 P.2d 947, 964 (Or. 1979); *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 591 (Or. 1977). An essential ingredient of proof of lost profits to a reasonable certainty is supporting data. *Hardwick*, 569 P.2d at 591.

[10] COT contends that the magistrate judge improperly applied an absolute certainty test when he determined that COT's expert's testimony was insufficient because he did not know the number of salespeople COT employed after 1990, and because he based his projections on 10 salespeople when in fact COT employed only four. Although the magistrate judge found no evidence to support this opinion, COT argues that it was supported by COT's president who testified that he intended to hire two more salespeople and to open additional offices in each. However, COT points to no evidence which indicates these plans would have come to fruition had COT not terminated its contract with AT&T.[14] Therefore, it cannot be said that the

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[14] COT points to *Hardwick* for the proposition that lost profits calculations which project additional employees for the damages period meet the substantial

magistrate judge applied an absolute certainty standard by finding that experts must have some verifiable basis for their opinion.

[11] COT also maintains that the magistrate judge impermissibly reweighed the evidence when he found fault with the expert's failure to make specific allowance for bad debts and failure to account for the effect of technological changes. Although it is true that the court should not re-weigh the evidence, *Garvin v. Greenback*, 856 F.2d 1392, 1396 (9th Cir. 1988), the court must still view the evidence in the light most favorable to the non-moving party to determine if the verdict is supported by substantial evidence. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). As to both of these factors, the magistrate judge could find no basis for the expert's opinions other than the expert's own assumptions.[15]

Other problems identified by the magistrate judge included, the expert's failure to account for the fact that COT intended to do its own billing in the future, the expert's assumptions that the discount levels would remain constant through the year 2000, his failure to talk to any customers or provide for possible competition, and his failure to research similar services provided by other companies before declaring SDN to be a unique product. This latter point, the magistrate judge stated, was very significant because a reseller can recover profits lost by a

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certainty test. 569 P.2d at 591. However, in *Hardwick*, the additional projected employees were based on the number of people that plaintiff would have needed if the log loader at issue in the breach of contract case had not been defective.

[15] COT argues that AT&T's own witness testified that COT would remain viable until 1998. However, although this testimony may have been offered to the jury, the future technological status of SDN was not included by the expert in his forecast of lost profits, and is a different issue entirely.

supplier's failure to deliver if no substitute can be found.[16] Relatedly, the magistrate judge found that the expert had considered all profits that COT might have realized through selling SDN as lost, without accounting for increased effort and sales of services provided by AT&T competitors.

Finally, the magistrate judge found that COT's expert failed to take into account that the problems COT encountered with AT&T's SDN services would have continued throughout the contract period and into the future. The magistrate judge therefore held that the expert testimony was not sufficient to support seven years of lost profits recovery.

[12] Given the myriad of flaws identified by the magistrate judge, it does not appear that, even viewing the evidence in the light most favorable to COT, AT&T was not entitled to judgment as a matter of law on the post-contract claim.

In the alternative, COT argues that if this Court finds that the jury verdict was not supported by substantial evidence, the district court must nevertheless be reversed because the magistrate judge improperly reduced the jury award in violation of the Seventh Amendment. The Seventh Amendment controls the allocation of authority to review verdicts in federal courts. *Gasperini v. Center for Humanities, Inc.*, _____ U.S. _____ 116 S.Ct. 2211 (1996). The Supreme Court has held that the re-examination clause of the amendment does not inhibit the power of the trial judge to grant new trials or to order remittitur. *Gasperini*, 116 S.Ct. at 2222.

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[16] For this proposition, the magistrate judge cited *Calbag Metals Co. v. Arkinson Co.*, 770 P.2d 600, 602-03 (Or. 1989); *United Engine Parts Co. v. Ried*, 584 P.2d 275 (1978); *Consolidated Data Terminals v. applied Digital Data Sys.*, 708 F.2d 385, 394-95 (9th Cir. 1983).

[13] Upon motion for a new trial, a trial court, finding a verdict excessive may either order a new trial or deny the motion conditional on the party accepting a remittitur. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). COT argues that it should have been given this option before the jury's award was reduced. However, the magistrate judge did not reduce the award upon AT&T's motion for a new trial, but rather upon their motion for judgment as a matter of law. Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside the verdict of the jury and enter judgment as a matter of law, and has been held to be constitutionally compatible with the Seventh Amendment. *Gasperini*, 116 S.Ct. at 2224 n.20; Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2522 pp. 241-42 (2d ed. 1995). The magistrate judge's action under Rule 50 does not appear to be in conflict with the Seventh Amendment.

[14] Furthermore, COT also argues that the magistrate judge improperly granted judgment as a matter of law based on a truncated trial record. COT asserts that it is reversible error for a district court to admit an expert's lost profit evidence at trial then, after eliminating the expert's evidence post-trial, and to grant judgment as a matter of law. *See Mid-continent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973) (holding same). Although it is true, as COT states, that a trial judge must consider all the evidence submitted in ruling on a motion for judgment as a matter of law, contrary to COT's position, the magistrate judge did not only consider a portion of the evidence submitted to the jury. Instead, the magistrate judge considered the entirety of the testimony of COT's expert, found that he should not have allowed the post-contract period evidence to be submitted, then reduced the jury's damage award. Therefore, COT's argument on this issue is misplaced.

The final issue on appeal concerns COT's punitive damage request. COT argues that, under Oregon law, when a plaintiff establishes a prima facie case of intentional interference with business relations, the plaintiff is entitled to present evidence of the defendant's financial condition in support of its claim for punitive damages. Or. Rev. Stat. 41.315. COT asserts that it presented a prima facie case of intentional interference with business relationships, survived AT&T's motion for judgment as a matter of law and convinced the jury that AT&T was an intentional tortfeasor, and therefore the magistrate judge erred in withholding its punitive damage claim from the jury.

[15] Whether to award punitive damages is a question of state law and is, therefore, reviewed de novo. *Mapes v. United States*, 15 P.3d 138, 140 (9th Cir. 1994). This Court must apply Oregon's law as the Oregon Supreme Court would apply it. *Intel Corp. v. Hartford Accident & Idem. Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991). Under Oregon Law, punitive damages are available when there is evidence of malicious or wanton conduct.[17] *Van Lom v. Schneiderian*, 210 P.2d 468 (Or. 1949). When punitive damages are sought, the judge determines whether there is evidence of malice as a matter of law, and if he decides there is, the assessment of damages is committed to the jury's discretion. *Van Lom*, 210 P.2d at 469. This court has determined that punitive damages may be awarded under Oregon State law for the tort of tortious interference with an economic relationship, *Kraus v. Santa Fe Southern Pac. Corp.*, 878 F.2d 1193 (9th Cir. 1989), *cert. dismissed*, 493 U.S. 1051 (1990), and Oregon courts have held that punitive damages may be awarded for tortious interference with a business relationship if actual

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[17] The Oregon Supreme Court has sanctioned the award of punitive damages "whenever there was evidence of a wrongful act done intentionally, with knowledge that it would cause harm to a particular person or persons." *McElwain v. Georgia-Pacific Co.*, 421 P.2d 957 (Or. 1966).

damage are awarded on the same claim. *Employees Fire Ins. co. v. Love It Ice Cream Co.*, 670 P.2d 160 (Or. app. 1982) (citing *Belleville v. Davis*, 498 P.2d 744 (1972)).

[16] COT argues that, having prevailed on its claim for tortious interference with contract, the magistrate judge erred in not instructing the jury on punitive damages. In denying COT's instruction on punitive damages and not allowing COT to introduce evidence of AT&T's financial condition, the magistrate judge noted his concerns over prejudicing the jury. However, because this Court conducts de novo review on this issue, and in light of the jury verdict in this case, it appears that the punitive damage instruction should have been given. The Oregon Supreme Court has held that when an error affects only the availability and amount of punitive damages, it is appropriate to remand that case for trial on those issues. *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1023 (Or. 1990). Therefore, it is appropriate to remand the case for a new trial on the issue of punitive damages.

For the foregoing reasons, the magistrate judge's post-trial judgments are affirmed. However, his decision not to submit punitive damages evidence to the jury is reversed, and the case remanded on the issue of punitive damages.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

BRUNETTI, Circuit Judge, dissenting:

I dissent because I believe that the filed-rate doctrine preempts COT's state-law claims. I would reverse the magistrate judge's legal conclusion that the doctrine does not do so and mandate that the court dismiss COT's preempted state-law claims.

The majority concludes that the filed-rate doctrine does not preempt COT's claims because: (a) the case involves the provisioning of services rather than rate-setting; or alternatively, (b) the services at issue were not covered by the tariff. Both proffered reasons misinterpret the filed-rate doctrine.

A. *Both Rates and Corresponding Services Are Covered by the Filed-Rate Doctrine.*

To avoid being an empty letter, the filed-rate doctrine must encompass both rates and the services corresponding to those rates. The opinion erroneously narrows the scope of the doctrine by stating that "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply."

The Communications Act provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. §203(a). The plain language of the statute mandates that tariffs include both rates and underlying services. Limiting the filed-rate doctrine to the rate-setting portion of the tariff undermines the goal which Congress expressed in section 203(a): the provision of rates and services in a nondiscriminatory manner.

In its most recent examination of this issue, the Supreme Court repeatedly stressed section 203(a)'s importance: "[t]he tariff-filing requirement is . . .the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, 514 U.S. 218, 114 S.Ct. 2223, 2231 (1994). "[R]ate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges . . . ." *Id.* "Rate filings are, in fact,

the essential characteristic of a rate-regulated industry." *Id.* at 2232.

Although the majority's interpretation would hold otherwise, rates have no meaning unless tied to corresponding services. Yet the majority argues that only the rate portions of the tariff are subject to preemption. Extending this analysis, carriers would be bound only to those rates and not to the corresponding services. If this were so, carriers could easily devise schemes to avoid the Communications Act's fairness requirements. In truth, regulation of rates divorced from services amounts to no regulation at all. For the requirements of the Communications Act to possess any import, both the rates and corresponding services must be covered by the filed-rate doctrine.

An examination of the tariff at issue illustrates this point. AT&T's tariff prescribes not only the rates for various types of services, but also AT&T's rights and liabilities in each of the areas in which COT claims that AT&T breached its obligations. These include: provisioning orders, billing, providing calling cards, requiring deposits and providing the long distance service itself. *See*, e.g., AT&T Tariff F.C.C. No. 1, §2.5.10 (provisioning), §6.2.4 (billing), §2.5.12.B (calling card), §2.5.6 (deposits), §6.2.5 (service support). The service specifics are clearly delineated in the tariff itself.

It is both counterintuitive and inconsistent with the traditional importance of the Communications Act to suppose that the filed-rate doctrine would encompass the rates in the tariff, but not the services contained in the same document. *See MCI*, 114 S.Ct. at 2226-28 (detailing historical importance of communications Act). To hold that anything less than all material aspects of the provided services are covered by the tariff eviscerates the "heart" of the Communications Act.

B. *Because the Services at Issue Were Not Covered by the Tariff, COT's Claims Are Preempted.*

The majority also concludes that the filed-rate doctrine does not preempt COT's claims because the tariff did not cover the services at issue. Although they are correct in asserting that the services were not in the tariff, it is precisely for this reason that COT's claims are preempted. AT&T is simply barred from contracting for non-tariffed services. To analyze this transaction it is necessary to examine both the filed-rate doctrine and the specific tariff at issue.

In its most general terms a filed tariff controls the legal relationship between a long-distance carrier and its customers. *See Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("This Court has long understood that the filed rate governs the legal relationship between shipper and carrier."). As the authorities cited by the majority acknowledge, AT&T is not allowed to provide services without filing a tariff setting the rate and all "classifications, practices, and regulations" corresponding to the rate. Furthermore, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . ." *Id.* (quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922). If AT&T could simply contract for untariffed services, it would never have to file a tariff in the first place and the filed-rate doctrine would be rendered meaningless.

However, COT argues, and the majority agrees, that AT&T entered into an enforceable contract for services which were not covered by the tariff. This argument misreads the filed-rate doctrine, which expressly prohibits a carrier from contracting for services not covered by the published tariff.

Chicago & Alton R.R. v. Kirby, 225 U.S. 155 (1912), a case the majority addresses in a footnote, illustrates the operation of

the doctrine. (Majority Opinion, footnote number 9). In *Kirby*, a carrier contracted with a shipper to deliver cargo on a expedited basis. When the carrier failed to perform, the shipper sued for breach of contract. The Supreme Court held that the contract was invalid under the filed-rate doctrine because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train" and gave "an advantage or preference not open to all and not provided for in the published tariffs." *Id.* 163-66. *See also Davis v. Cornwell*, 264 U.S. 560 (1924), *Atchison, T. & S.F. Fy. v. Robinson*, 233 U.S. 173 (1914).

The majority attempts to distinguish *Kirby* and its progeny by reasoning that COT is not seeking to obtain for the tariffed rate extra services not covered in the tariff, but is merely seeking the same services provided to AT&T's other customers. This is incorrect. COT is seeking services that are not covered in the tariff at the tariffed rate.

The majority also argues that COT's claims are not preempted because MLB, the option originally chosen by COT, was not covered by the tariff. Although the magistrate judge ruled that MLB was not a tariffed service, that decision is irrelevant to the result here. If the majority and the magistrate judge correctly identify MLB as a non-tariffed service, then *Kirby* dictates that AT&T was prohibited from entering into that agreement and it is now invalid. If, as AT&T claims, MLB was a tariffed service, then the filed-rate doctrine prohibits COT's state law claims. In either case, COT has no state-law claims against AT&T for MLB service.

The majority utilizes AT&T's expert testimony to conclude that neither the billing procedures nor the provision of SDN services were covered by the tariff. Again, this is of no import. If those service were not covered by the tariff, the agreements

were invalid and COT cannot now attempt to enforce them. If they were tariffed, they are preempted by the filed-rate doctrine.

While the filed-rate doctrine may create harsh consequences in some instances, the Supreme Court has consistently adhered to it because of the overarching policy of the Act, namely, prevention of discrimination. *See Maislin*, 497 U.S. at 128. Accordingly, a court is required to ignore allegations of fraud or other inequitable conduct in determining whether to apply the doctrine. "Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 489 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992). An examination of the filed tariff at issue, AT&T Tariff F.C.C. No. 1, proves instructive for this purpose.

Initially, the tariff sets forth the provisioning standards for establishing and confirming a due date when an order for SDN service is placed. In addition, AT&T must "make every reasonable effort to assure" that it is delivered on time, but if there is a delay in excess of 45 days, "the Customer may cancel the order without penalty or payment or nonrecurring charges." (§2.5.10.B). Under the tariff, the customer is responsible for payment of bills, except for the Location Account Billing Option, to which COT did not subscribe. For that option, AT&T "is not responsible for the way the Customer may allocate usage or charges among multiple Users." (§6.2.4).

For calling cards, the tariff provides that "[c]alls charged to a Local Exchange Company Calling Card or an AT&T Card will . . . be included on the LDMTS bill for the Main Billed Account with which the card is associated." (§ 2.5.12.B). The tariff also delineates deposit provisions for customers who have a "proven history of late payments . . . or whose financial responsibility is not a matter of record." It requires those customers to "make a

deposit to be held as a guarantee for the payment of charges." (§ 2.5.6.A).

The tariff's service provision states that "Custom Network Services are fully supported by the Company through engineering, installation and maintenance efforts. The Company will assure that each service functions properly within its specified transmission and switching parameters." (§ 6.2.5). "When installation of a second component is required it will be installed subject to the availability of installation personnel and equipment." (§ 6.2.5B).

As these excerpts illustrate, the tariff is an exhaustive document, covering numerous types of service and contingencies between AT&T and its customers. The above-cited sections are material to COT's claims concerning delay and provisioning and its claims should have been addressed by looking to the tariff's provisions in the context of the Communications Act.

AT&T adopts this position, arguing that the filed-rate doctrine preempts COT's claims because COT is seeking to enforce a contract for services not provided for in the tariff. COT is therefore impermissibly seeking "an advantage or preference not open to all and not provided for in the published tariffs." *Kirby*, 225 U.S. at 166.

As noted earlier, COT counters that the filed-rate doctrine does not apply because COT was not demanding better service for the tariffed rate. Instead, COT argues that "while COT paid the same rates as AT&T's favored corporate customers, COT was given inferior SDN service and denied SDN features that were provided to AT&T's favored customers." However, if this

truly were COT's claim, its remedy was to bring a suit for discrimination under 47 U.S.C. §§ 202, 206, and 207.[18]

COT also argued that "it is elementary" that the filed-rate doctrine does not apply to untariffed services, or in other words, that common-law applies to fill in gaps left in tariffs. The majority accepts this contention. However, none of the three cases cited by COT support this "elementary" proposition. *MCI v. Credit Builders of Am., Inc.*, 980 F.2d 1021, 1022-23 (5th Cir.), *vacated*, 508 U.S. 957, *reinstated*, 2 F.3d 103, *cert. denied*, 510 U.S. 978 (1993), holds only that a carrier's suit to collect unpaid tariffed charges does not "arise under" federal law within the meaning of 28 U.S.C. §§ 1331 and 1337. This holding is irrelevant to this case.[19] *Security Servs. Inc. v. K Mart Corp.*, 511 U.S. 431, 114 S. Ct. 1702, 1710 (1994), held only that a carrier cannot base a rate collection action on a tariff that is void. This is also inapplicable here.

Finally, *US Wats, Inc. v. AT&T*, No. Civ.A 93-1038, 1994 WL 116009 (E.D.Pa. Apr. 5, 1994), comes closest to supporting COT's proposition. There, the district court rejected AT&T's argument that the filed-rate doctrine preempted the plaintiff's breach of contract claim for refusing to transfer end users from one SDN to another because such a claim "will neither result in rate discrimination nor embroil the court in a dispute over the reasonableness of AT&T's charges in contravention of the

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[18] On October 22, 1993, eight months after the discovery cut-off and long after the two-year statute of limitations had run (*see* 47 U.S.C. § 415), COT sought leave to filed a second amended complaint to add a claim that AT&T had engaged in discrimination against resellers in violation of § 202. The magistrate denied COT leave to file this amended complaint and COT does not appeal from this ruling.

[19] In any event, Ninth Circuit case-law holds the contrary position. *Sea-Land Serv. Inc. v. Murrey & Son's Co.*, 824 F.2d 740, 744 (9th Cir. 1987).

FCC's ratemaking authority." *Id.* at *5.[20] Under *US Wats*, COT's claims are viable only if they would not result in rate discrimination.

In footnote number 9, the majority cites *Kirby*, *Davis* and *Atchison* to refute AT&T's argument that "the filed-rate doctrine precludes a carrier from entering into 'side-deals' which give preference to certain customers and are not defined in the filed-rates." However, these cases all dealt with service provisions that were not specified in the tariff. It was *precisely because* the service provisions were not included in the tariff that the Supreme Court held that they were not enforceable as a matter of contract law.

COT also argues that the "savings clause" of 47 U.S.C § 414 preserves its state-law claims. That section states: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Initially, it is important to note that the Interstate Commerce Act contained an identical savings clause at the time of the Supreme Court's decision in *Kirby*. *See* 49 U.S.C. § 22.

In *Texas & Pac. Ry. v. Abilene COTton Oil Co.*, 204 U.S. 426 (1907), the plaintiff brought a common-law state action arguing that a shipper's published rates were unreasonable and discriminatory. *Id.* at 430. The Court held the action to be preempted despite the savings clause. *Id.* at 466. As later described in *Nader v. Allegheny Airlines*, 426 U.S. 290, 298-99 (1976), the *Abilene COTton* Court "found that the continuance of private damages actions attacking the reasonableness of rates

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[20] In addition, it is arguable that *US Wats* was incorrectly decided because the plaintiff in that case should have properly brought a claim for discrimination under § 202(a) or unreasonable practices under § 201 rather than a claim for breach of contract.

subject to the regulation of the Interstate Commerce Commission would destroy the purpose of the Interstate Commerce Act, which was to eliminate discrimination by requiring uniform rates."

In *Nader*, the plaintiff brought a common-law action against an airline seeking damages sustained as a result if its overbooking practices. 426 U.S. at 292-93. The Court, distinguishing *Abilene COTton*, concluded that the action was not preempted because the Court was not being called upon to make a determination of the reasonableness of a rate or practice that could be contrary to the regulatory agency's decision. *Id.* at 299. Any impact on rates, reasoned the Court, "would be merely incidental." *Id.* at 300.

In *Cooperative Communications, Inc. v. AT&T*, 867 F. Supp. 1511 (D.Utah 1994), an aggregator brought suit against AT&T. The district court held that the savings clause "preserves causes of action for breaches of duties distinguishable from those created under the Act." *Id.* at 15-16. In other words, "state-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." *Id.* (quoting *Kellerman v. MCI*, 493 N.E.2d 1045, 1051, *cert. denied*, 479 U.S. 949 (1986)). The plaintiff alleged that AT&T attempted to drive it out of business by making intentional misrepresentations to the plaintiff's clients, by misappropriating plaintiff's confidential client billing information, and by attempting to destroy plaintiff's customer base. *Id.* at 1514. The court held the claims based on these allegations were not preempted. *Id.* at 1516.

Cooperative Communications is distinguishable because it did not involve a relationship between AT&T and its customer and did not implicate AT&T's duties under § 203. Because COT's claims seek better (or different) service than is published

in AT&T's tariff, the savings clause does not save COT's claims. As in *Kirby*, the plaintiff's claims interfere with the purpose of the Act because they seek treatment that is different from the published tariff.

COT also argues that even if the filed-rate doctrine applies, its state-law claims remain viable because it was required to prove, in accordance with the tariff, that AT&T engaged in "wilful misconduct." The tariff provides that the "Company's liability, if any, for its wilful misconduct is not limited by this tariff." (§ 2.3.1.A.) AT&T argues that COT's claims are nevertheless preempted because the "wilful conduct" consisted of wilfully failing "to implement the very alleged side deals that are illegal and that would have given COT illegal preferences over other similarly-situated customers (i.e. resellers)."

AT&T's argument is supported by Supreme Court precedent. In *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), the Court held that a passenger who purchased a train ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent collection of the higher tariff rate by the railroad. As described by the Court in *Maislin*, the *Maxwell* Court's approach "was deemed necessary to prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts." 497 U.S. at 127.

That AT&T wilfully broke its "agreements" with COT should not alter the *Kirby* preemption analysis. If it could, the *Kirby* approach to the filed-rate doctrine would be rendered a nullity. That the tariff did not limit AT&T's liability for "wilful misconduct" does not mean that COT should not still have to pursue damages for such misconduct through §§ 202, 206 and 207 of the Act.

C. *Conclusion*

The outcome that I advocate may appear inequitable. I share the majority's concerns about AT&T's conduct in its dealing with COT. However, the Supreme Court has consistently ruled that the filed-rate doctrine's precepts outweigh any equitable issues. We may question the wisdom of the filed-rate doctrine, but it the law of the land. *See MCI*, 114 S. Ct. at 2233. ("[O]ur estimations . . . of desirable policy cannot alter the meaning of the Federal Communications Act of 1934.")

I dissent because the majority's decision is a significant one. The result will allow COT to conduct another trial, where it will present evidence about how badly AT&T treated it and in which the only determination for the jury will be the amount of punitive damages to award to COT. Although this would be the correct disposition if COT's claims were not preempted, I believe that the filed-rate doctrine bars those claims. Therefore, I dissent.

FILED 94 NOV 9

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	)	
	)	Civil No. 91-1236-JE
Plaintiff,	)	
	)	OPINION
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	)	
Defendant.	)	

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JELDERKS, Magistrate Judge:

Plaintiff Central Office Telephone, Inc. (COT) brought this action against American Telephone and Telegraph Company (AT&T). AT&T denied liability, and brought a counterclaim against COT. COT's claims for breach of contract and intentional interference with business relations were tried to a jury, which found in COT's favor and awarded damages in the amount of $13,000,000. The jury also found in COT's favor on AT&T's counterclaim.

AT&T now moves for judgment as a matter of law, for a new trial, or for remittitur. I deny the motion for remittitur, and grant in part and deny in part the motion for judgment as a matter of law. Pursuant to Fed. R. Civ. P. 50(c), I conditionally deny AT&T's motion for a new trial. For the reasons set forth

below, I am entering an amended judgment reducing COT's award to $1,154,000.

BACKGROUND

The background of this action is fully set forth in Findings and Recommendations and Opinions issued earlier, and will be set out only briefly here.

COT, an Oregon corporation, resells communications services provided through other companies, formerly including defendant AT&T. This action concerns AT&T's provision of a service known as the "Software Defined Network" (SDN). SDN is a form of long distance service that AT&T provides to certain large customers, who receive volume discounts by subscribing to purchase large blocks of communication time. Customers who do not need all of the purchased time may resell unused portions to other users. Independent businesses like COT can also resell SDN services by aggregating smaller customers who alone do not use enough long distance services to qualify for

volume discounts. COT sought to realize profits by retaining a portion of the large-user discount for itself, and passing on a portion of the discount to its "aggregated" customers.

COT initially contracted for AT&T's SDN services in October 1989, and entered into a second contract for SDN services in April 1990. At trial, COT presented considerable evidence that it experienced serious delays and errors in provisioning and billing soon after it began selling SDN services to its customers. COT's sales of AT&T's SDN services rose from February 1990 through August 1990. They subsequently declined rapidly, at least in part because COT salespersons more actively promoted sales of the services of other carriers, especially Sprint, because of delays in receiving commissions on SDN sales.

In a letter dated September 17, 1992, COT informed AT&T that it wished to be disconnected from SDN, and that it would not pay for any usage charges that might be incurred after

September 30, 1992. At trial, COT personnel testified that COT discontinued sale of SDN because of the problems it experienced with provisioning and billing of the SDN services. COT has alleged earlier, however, and one of its witnesses testified at trial, that COT stopped selling SDN at that time at least in part because of SDN price increases.

COT's claims for breach of contract and intentional interference with prospective business advantage were tried to the jury, which was instructed that it could award damages only if it found that AT&T had engaged in willful misconduct. The jury determined that COT should recover $13,000,000 to compensate for profits lost until the year 2000. That amount was one of three possible total damage figures offered by Mr. Hainline, COT's damages expert. Hainline testified that one of his calculations showed "approximately 13 million" in past and future profits that COT would have realized "absent difficulties" with the provision and billing of SDN services. Another of Hainline's calculations showed total lost past and future profits

of approximately $17,500,000. Hainline later testified that this figure should be reduced to account for a number of variables, and that the "appropriate combined damage number" was $14,500,000.

STANDARDS

1. Motion for a New Trial

The court must grant a motion for a new trial if it concludes that the verdict is against the clear weight of the evidence. Landes Const. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1372 (9th Cir. 1987); Fenner v. Dependable Trucking Co., 716 F.2d 598, 602 (9th Cir. 1983). The court can weigh the evidence and assess the credibility of the witnesses, and is not required to view the evidence from the perspective most favorable to the prevailing party. Landes Const., 833 F.2d at 1371.

A motion for a new trial is properly granted when the court concludes that the jury has reached a seriously erroneous result, Digidyne Corp. v. Data General Corp., 734 F.2d 1336,

1347 (9th Cir. 1984), cert. denied, 473 U.S. 908 (1985), or when a new trial is necessary to avoid a miscarriage of justice. Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). A motion for a new trial may also be granted where substantial errors were made in admission of evidence or jury instructions. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940).

2. Remittitur

Remittitur is available to correct excessive verdicts. See Fenner, 716 F.2d at 603 n. 3. A trial court reviewing a damage award attacked by a defendant as excessive must consider the evidence of damages in a light most favorable to the prevailing party. Seymour v. Summa Vista Cinema, Inc., 809 F.2d 1385, 1387 (9th Cir. 1987).

If it concludes that a damages award is excessive, the court may either grant the defendant's motion for a new trial, or deny the motion, conditioned upon the prevailing party's acceptance of a remittitur. Id. A trial court granting a motion

for remittitur does not substitute its judgment for that of the jury, but instead reduces the judgment to the maximum amount sustainable by the proof. D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245 (9th Cir. 1982), citing Ogilvie v. Fotomat Corp., 641 F.2d 581, 586 (8th Cir. 1981); Keye v. Lauga, 635 F.2d 330 (5th Cir. 1981); Bonura v. Sea Land Service, Inc., 505 F.2d 665, 669 (5th Cir. 1974). A prevailing party that has accepted a remittitur cannot challenge the remittitur on appeal or cross appeal. 999 v. C.I.T. Corp., 776 F.2d 866, 873 (9th Cir. 1985), citing S. Birch & Sons v. Martin, 244 F.2d 556, 560 (9th Cir.), cert. denied, 355 U.S. 837 (1957).

3. Motion for Judgment as a Matter of Law

A party is entitled to judgment as a matter of law, formerly known as a judgment notwithstanding the verdict (JNOV), if the evidence, viewed with all reasonable inferences taken in favor of the nonmoving party, does not support the verdict. See, e.g., Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387 (9th Cir.), cert.

denied, 469 (1984). If the jury verdict is supported by substantial evidence, the court cannot weigh the evidence or substitute its judgment for that of the jury. Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir. 1988). A motion for judgment as a matter of law should be granted if, without considering the credibility of the witnesses, the evidence and inferences that may be drawn from it, viewed most favorably for the nonmoving party, can support only the conclusion that the moving party is entitled to judgment. Id. A motion for judgment as a matter of law should not be granted if reasonable minds could differ over the verdict. United States v. Callahan, 884 F.2d 1180, 1183 (9th Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

DISCUSSION

Before turning to the basis for my decision to grant in part AT&T's motion for judgment as a matter of law and to enter an amended judgment, I will briefly discuss why I have concluded that a new trial or remittitur are not appropriate.

1. Motion for New Trial

As noted above, a motion for a new trial is properly granted only if the verdict is against the clear weight of the evidence, where a new trial is necessary to avoid a miscarriage of justice, or where substantial errors were made in admission of evidence or jury instructions. Here, after carefully reviewing the parties' arguments and studying substantial portions of the trial transcript, I have concluded that I erred in allowing the jury to award damages for any period of time after COT terminated its relationship with AT&T. I am satisfied, however, that sufficient evidence supported the jury's conclusions as to liability on COT's claims and AT&T's counterclaim. Though it presents a close question, I have also concluded that sufficient evidence supported the jury's award of damages up to the time COT discontinued its sale of SDN services.[1] I am likewise satisfied

[1] Because the damages that the jury awarded for that period are discernable from the record, the proper remedy for my error is not the granting of a new trial on the damages question, but a reduction of the damages to the pre-termination amount.

that, except for my error in not striking damage testimony related to the post-September 1992 period, there were no substantial errors in the admission of evidence to mislead the jury. Further, except for allowing the jury to allocate damages for the post-September 1992 period, I do not think that my instructions were incorrect.

If a party seeking judgment as a matter of law also moves for a new trial, Fed. R. Civ. P. 50(c) requires a court granting a motion for judgment as a matter of law to determine whether a new trial should be granted if the judgment is later vacated or reversed. Pursuant to this role, I conditionally deny AT&T's motion for a new trial. If an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand. If my original decision to submit the issue of post-September 1992 damages to the jury on the evidence presented had been correct, the award would not be against the clear weight of the evidence or the product of erroneous evidentiary rulings and instructions.

2. Remittitur

In granting a remittitur, the court reduces the judgment to the maximum amount that is supported by the evidence. My reduction of the judgment here does not reflect a conclusion that the jury award was excessive, as that term is used in the context of remittitur. As discussed below, whether COT's evidence and methodology are sufficient to support any award of damages presents a close question. I have concluded that they are sufficient for the period of time before COT stopped purchasing and reselling SDN services in September 1992. I therefore am not amending the judgment to reduce the damages as a remittitur. Instead, I am reducing the judgment to correspond to only that period of time for which I should have allowed the jury to consider awarding damages. The amended judgment provides COT a full recovery of the amount awarded by the jury through September 1992, when COT discontinued sale of SDN services. As discussed below, I erred, as a matter of law, in

allowing the jury to consider and to award damages beyond that date.

3. Judgment as a Matter of Law

a. Filed Tariffs and Federal Communications Act (FCA) preemption

AT&T contends that it is entitled to judgment as a matter of law because "[t]he filed tariff doctrine and the comprehensive scheme of the Federal Communications Act bar COT's claims." It argues that COT's breach of contract claim related to only "matters governed by filed tariffs," and that those tariffs preempted "state law contract claims." AT&T further argues that COT's tort claim is "cognizable under," and preempted by, the Federal Communications Act. It also contends that, even if COT's claims were not preempted, I improperly instructed the jury that it could look outside the tariffs to determine the terms and conditions of the parties' agreement.

I need not address these arguments at length here. The parties' respective positions on the filed tariff doctrine were

extensively briefed and argued throughout the course of this litigation. I remain convinced that the critical conduct here was largely outside the scope of the tariffs. As I noted in an opinion filed on December 8, 1993, COT challenged not the reasonableness or validity of the filed rate--issues properly subject to the filed rate doctrine--but the manner in which AT&T provided its services. In addition, Multi Location Billing (MLB), a subject of considerable contention in this dispute, is an untariffed service that is subject to a separate agreement between the parties.

I also remain convinced that the jury was properly instructed as to how it should determine the parties' rights and obligations. The jury was instructed that those rights and obligations were controlled by the terms of any applicable tariffs, and that the parties could make no agreements contrary

to the tariffs. The jury was likewise instructed, consistently with the tariffs, that AT&T could be liable only for willful misconduct.

b. Damages

In calculating COT's damages, Hainline established as a base line for COT's SDN sales the seven-month period between February and August 1990. Hainline determined that SDN monthly sales averaged $17,805 during that period, and chose that particular time because sales of SDN subsequently dropped rapidly. Using a trend line based upon sales of SDN during the base period he had selected, Hainline started from a monthly base sales total of $67,355 for April 1990, and added increments of $17,805 to that amount for each of the next six months. He increased the projected monthly growth to $25,000 for each month in the subsequent six-month period, and ultimately projected that, with the addition of new salespersons, sales of SDN would have increased another $35,000 per month during a

later period. Hainline hypothesized that, but for AT&T's failure to properly deliver SDN services, COT would have realized gross revenues of $15,342,000 through September 1992. Hainline calculated the lost profits associated with those lost revenues as $1,154,000. He calculated that COT's inability to market SDN cost the company another $28,200,000 in lost revenue, representing lost profits of $2,971,000, between September 1992 and April 1994. Applying the same methodology, with some minor modifications, Hainline calculated that COT lost an additional $9,088,800 between April 1994 and the year 2000. Hainline based his trial testimony that COT lost profits of "approximately 13 million" on a totalling of the lost profits from those three periods. The jury's verdict of $13,000,000 is obviously based upon that total.

During the trial, AT&T moved to strike Hainline's damages analysis on a number of grounds. I had serious reservations about COT's lost profits evidence, and about the

appropriateness of allowing the jury to award damages for projected lost future profits beyond the time when COT terminated its relationship with AT&T. A thorough review of the trial testimony and exhibits related to damages has only reinforced my concerns. The following are some of the problems with COT's damages evidence:

(1) Hainline lacked important information about COT's sales force. He did not know, for example, what COT sales people did after August 1990, and speculated that the sales force might have stopped selling communications services after COT began having problems with SDN provisioning and billing. COT's sales force did not in fact disappear, but continued to sell communications services obtained primarily through Sprint. In addition, Hainline concluded that COT could support 10 sales people--six more than it actually employed--and assumed that these additional persons would sell at the same rate as the then existing sales persons. These projections are

simply assumptions for which I find no evidence other than Hainline's opinion. Certainly, Hainline was qualified to testify as an expert on certain matters. Even experts, however, must have some objective and verifiable basis for their opinions.

(2) Though he testified that he had "implicitly given an effect to bad debts," Hainline testified that he did not make any specific allowance for the failure of some customers to pay their bills. Hainline said that he assumed that bad debts would "not exceed the additional costs that COT had incurred," an apparent reference to costs associated with past billing problems. He did not, however, offer a basis for that assumption.

(3) Though SDN and other communications services are based upon a complex and changing technology, Hainline made no allowances for the possibility that SDN's value, marketability, and profitability might be seriously affected by technological changes before the year 2000. Instead,

with no apparent basis within his own area of expertise, Hainline simply concluded that it "did not seem unreasonable . . . that there was 5-1/2 years left on the technology. . . ."

(4) Hainline erroneously assumed that COT had intended to stay with MLB throughout the time it planned to market SDN. Gordon Rood, COT's president, testified that COT had always intended to do its own billing after it had grown.

(5) In calculating lost profits, Hainline assumed that the discount levels--the rate reductions that COT shared with its customers--would stay constant until the year 2000. He did not know the current SDN discount level or rates per minute at the time of trial, and was unaware that, under the applicable tariffs, AT&T could change the discount levels on 14 days notice.

(6) In conducting his damage study, Hainline did not talk to any of COT's customers or to any other

resellers. Nothing in his testimony or in the exhibits he prepared indicates that he accounted for the possibility that the substantial profits he projected for COT would attract competition that could reasonably be expected to ultimately reduce COT's sales and profits.

(7) Hainline testified that his projections of lost future sales and profits was based upon his understanding that SDN was a unique product, superior to any competing services. He also testified, however, that he had not studied the features or costs of the services offered by MCI and Sprint, and that he had not examined the time it generally took to provision a customer who had chosen Sprint instead of AT&T. His conclusion that SDN was a "unique product in a unique market" therefore lacks sufficient foundation. Hainline's assumptions as to the uniquely appealing characteristics of SDN appear to be inconsistent with Rood's testimony that, after a certain date, COT's salespersons would, in the vast majority of cases, sign up

customers on Sprint instead of AT&T. COT's ability to sell Sprint to customers who otherwise might have purchased SDN seriously undermines the contention that AT&T's product was "unique" as that term is generally understood when a reseller asserts an injury based upon a supplier's failure to deliver.

Hainline's failure to carefully examine services available for resale from AT&T's competitors is significant. A reseller can recover profits lost as a result of a supplier's failure to deliver only if it cannot obtain substitute performance from another supplier. See Calbag Metals Co. v. Guy F. Atkinson Co., 95 Or. App. 514, 518-519, 770 P.2d 600, 602-603 (1989); United Engine Parts, Inc. v. Ried, 283 Or. 421, 432, 584 P.2d 275 (1978); Consolidated Data Terminals v. Applied Digital Data Sys., 708 F.2d 385, 394-395 (9th Cir. 1983). Here, Hainline's analysis failed to acknowledge or account for the fact that, as COT's sales of SDN decreased, its sales of Sprint increased.

(8) Hainline's study assumed that, once COT no longer sold SDN services, all profits that it might have realized through selling SDN were "lost." This assumption was incorrect because it failed to account for profits COT might realize by selling services obtained from AT&T's competitors. COT clearly has continued in business. That being the case, one can only rationally assume that at least some of the efforts that the company might otherwise have expended in marketing SDN and servicing its SDN accounts have been diverted to reselling and servicing accounts using services of AT&T's competitors.

(9) AT&T provides SDN services in a heavily regulated industry, and is required to provide its services to customers such as COT on a nondiscriminatory basis. In projecting more than seven years of lost profits based upon the termination of the parties' relationship, Hainline did not consider whether the problems which caused COT to terminate its sales of SDN in 1992 still existed by the time the contracts

were otherwise scheduled to terminate,[2] and whether those problems could reasonably be expected to exist until the year 2000. This is significant, because it appears that, if COT sought to again purchase those services, AT&T would have an ongoing legal obligation to furnish SDN services to COT for resale on the same terms and conditions that it provides SDN to other customers.

To briefly summarize, Hainline projected nearly 10 years of lost profits based upon only a few months of actual sales. Hainline is not an expert in the complex field of communications technology, and he failed to consider price changes, changes in provisioning delays, AT&T's obligation to provide SDN on a nondiscriminatory basis, the availability of

[2] Rood testified that COT salespersons would have preferred to sell SDN rather than Sprint, but had to sell Sprint because SDN was not provided on a timely basis. Curiously, Rood was unaware of how long it normally took to provision COT customers purchasing SDN by the time COT terminated its relationship with AT&T. AT&T presented evidence at trial that it was provisioning SDN customers within 30 to 40 days by September 1992, and Rood testified that he thought that that interval, if achieved, would have met AT&T's obligation.

substitute products, or the fact that COT sold other products to customers who otherwise might have purchased SDN.

Damage calculations must be based upon reasonable assumptions, and must be consistent with real business conditions. See, e.g., Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1262 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). Though it is a close question, I have concluded that Hainline's study is sufficiently grounded in objectively verifiable facts and reasonable assumptions to support the jury's award of lost past profits up to COT's termination of its SDN sales in September 1992. It clearly is not sufficient, however, to support more than seven years of lost profits beyond that point. The huge lost profits Hainline projected simply cannot, under the facts in evidence in this action, rest on so narrow a base.

As noted above, a party is entitled to judgment as a matter of law if the evidence, viewed with all reasonable inferences taken in favor of the nonmoving party, does not

support the verdict. Here, drawing all reasonable inference in COT's favor, the evidence would support only the conclusion that COT is not entitled to recover damages for the period following its termination of its agreements with AT&T. Beyond that point the evidence of damages became simply too speculative and attenuated, and COT's contention that it was entitled to further recovery is legally untenable. As a matter of law, I should have stricken evidence of the post-September 1992 period, and should not have allowed the jury to consider awarding damages past that time.

In concluding that I should have stricken this evidence, I am mindful that a plaintiff is not required to prove the amount of damages incurred with mathematical certainty, but instead "need only establish the fact of damages and evidence from which a satisfactory conclusion as to the amount of damages can be reached." North Pacific Lumber v. Moore, 275 Or 359, 366, 551 P.2d 431 (1976). Given that SDN is a complex technology

sold in a competitive and changing market, at varying prices, the evidence COT produced could not allow a "satisfactory conclusion" as to the amount of damages, if any, actually incurred after September 1992.

My conclusion that COT cannot recover for the post-September 1992 period is based in part upon the speculative nature of the evidence of lost profits past that point, and upon the lack of support for many of the critical assumptions made by COT's damages expert. It is also based upon the legal requirement, noted above, that a seller in COT's position demonstrate that substitute sources of supply were not available,[3] and upon COT's failure to establish that AT&T was not materially performing by that time. In arguing that it is

[3] Because COT was selling Sprint services before September 1992, this conclusion could lead one to question my decision to allow the verdict to stand up to that period. I have concluded that the verdict should stand to that point because the jury could reasonably have concluded that problems with SDN provisioning and billing seriously disrupted COT's operations, and reduced its profits in the amount represented by the portion of the $13,000,000 award related to that period. The jury could reasonably have concluded that, until COT terminated its purchase of SDN, AT&T both interfered with its prospective business advantage, and failed to meet its contractual obligation to furnish a "functional" SDN.

entitled to recover damages until the year 2000, COT relies upon Oregon cases stating that, following a total breach of contract, a nondefaulting party may consider the contract terminated and bring an action for damages. See Mohr v. Lear, 239 Or. 41, 395 P.2d 117 (1964); Krebs Hop Co. v. Livesley, 59 Or. 574, 114 P. 944 (1911). This reliance is misplaced. As the Mohr court noted, an action for damages grounded upon repudiation or total breach must be based upon conduct motivated by a "positive, definite, absolute, unconditional and unequivocal intent evincing a fixed purpose not to perform in any event." Mohr, 239 Or at 49. In the present action, the evidence admitted at trial would not support the conclusion that AT&T was demonstrating an unequivocal intent not to perform at the time COT terminated its sale of SDN. Instead, the evidence would support only the conclusion that AT&T had corrected, or was in the process of correcting, problems with provisioning of its SDN services. Certainly, given the significant problems that COT had

encountered regarding SDN, the jury could have reasonably concluded that COT was entitled to discontinue its relationship with AT&T without penalty, and that it was entitled to recover past lost profits caused by AT&T's breach of contract and interference with COT's prospective business advantage. The jury's conclusion that COT was not liable on AT&T's counterclaim was also supported by the evidence. As a matter of law, however, COT could not, under these circumstances, terminate the contract and continue to recover damages for more than seven additional years.

CONCLUSION

I deny AT&T's motion for remittitur (#448-3). I grant in part and deny in part AT&T's motion for judgment as a matter of law (#448-1), and will enter an amended judgment in the amount of $1,154,000. Pursuant to Fed. R. Civ. P. 50(c), I conditionally deny AT&T's alternative motion for a new trial (#448-2).

DATED this 9th day of November, 1994.

(John Jelderks)
John Jelderks
United States Magistrate Judge

FILED 94 NOV 9

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC., Plaintiff,	) Civil No. 91-1236-JE
AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	) ORDER

JELDERKS, Magistrate Judge:

Defendant AT&T's motion for remittitur (#448-3) is DENIED. Defendant AT&T's motion for judgment as a matter of law (#448-1) is GRANTED in part and DENIED in part, and an amended judgment in the amount of $1,154,000 will be entered. AT&T's alternative motion for a new trial (#448-2) is conditionally DENIED pursuant to Fed. R. Civ. P. 50(c).

DATED this 9th day of November, 1994.

(John Jelderks)
John Jerderks
United States Magistrate Judge

FILED 95 JAN 11

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	)	
	)	Civil No. 91-1236-JE
Plaintiff,	)	
	)	ORDER
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	)	
	)	
Defendant.	)	

JELDERKS, Magistrate Judge:

Plaintiff Central Office Telephone, Inc. (COT) seeks an order altering the amended judgment entered in its action against defendant American Telephone & Telegraph (AT&T) on November 9, 1994. COT contends that I relied upon the wrong exhibit in concluding that it had established damages of $1,154,000 through September 1992.

At trial, Hainline cited several different calculations of COT's lost past and future profits. Exhibit 252 showed lost profits of $4,125,023 during the four year contract period ending

in April 1994, and exhibit 255 showed additional lost future profits of $9,088,800 through the year 2,000. As Hainline noted at trial, the total of the figures set out in these exhibits is "approximately 13 million." Trial Transcript at 1921. In my opinion addressing AT&T's post-trial motions, I noted that the jury's conclusion that COT had incurred $13,000,000 in damages was "obviously based upon" Hainline's trial testimony that it had been damaged in that amount. The $1,154,000 figure stated in my November 9, 1994 order represents the portion of the damages set out in exhibit 252 that COT incurred between April 1990 and September 1992.

COT now argues that, in determining what damages it had established for that period, my reliance upon exhibit 252 was in error. It argues that I instead should have referred to exhibit 253, showing losses of $1,628,824 through September 1992, and total losses of $5,467,422 through September 1994. COT contends that exhibit 253 is the correct source of the

damages figure because that exhibit, not exhibit 252, actually "formed the basis" of Hainline's calculations.

I disagree. In determining what portion of the jury's damages award is attributable to the period ending in September 1992, the critical issue is not Hainline's ultimate opinion as to COT's total damages. Instead, the question is which of the exhibits corresponds to the amount the jury awarded. Hainline's projections reflected in Exhibit 252 are consistent with the $13,000,000 jury award. His projections in exhibit 253 are not. I therefore deny COT's motion to alter the amended judgment.

CONCLUSION

Plaintiff COT's motion to alter the amended judgment (#485) is DENIED.

DATED this (11) day of January, 1995.

(John Jelderks)
John Jelderks
United States Magistrate Judge

FILED JUL 18 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTRAL OFFICE TELEPHONE, INC.,	) NOS. 94-36116; 94-36156
Plaintiff-Appellee and Cross-Appellant,	) D.C. NO. CV-91-1236-JAJ
v.	)
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	) ORDER
Defendant-Appellant and Cross-Appellee.	)

Before: FERGUSON and BRUNETTI, Circuit Judges, and KING,* District Judge.

Judge Ferguson and Judge King have voted to deny the petition for rehearing. Judge Brunetti has voted to grant the petition for rehearing. Judge King has voted to reject the suggestion for rehearing en banc, Judge Ferguson has recommended rejection of the suggestion for rehearing en banc. Judge Brunetti has voted to accept the suggestion for rehearing en banc.

* Hon. Samuel P. King, Senior United States District Judge for the District of Hawaii sitting by designation.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED 94 NOV 9

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC., Plaintiff,	) Civil No. 91-1236-JE
AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	) AMENDED JUDGMENT

Based on the record,

IT IS HEREBY ORDERED that the judgment entered on July 1, 1994 is amended. Judgment in the amount of $1,154,000 is entered in favor of plaintiff. Interest shall accrue on this amount commencing July 1, 1994.

DATED this 9th day of November, 1994.

(John Jelderks)
JOHN JELDERKS, U.S. MAGISTRATE JUDGE

FILED 94 JUL 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC., Plaintiff,	) Civil No. 91-1236-JE
AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	) FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable John A. Jelderks, United States Magistrate Judge, presiding, and the issues having been duly tried and a jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED

That the Plaintiff, Central Office Telephone, Inc., recover from the Defendant, American Telephone & Telegraph Company, the sum of THIRTEEN MILLION DOLLARS ($13,000,000), with post-judgment interest thereon compounded

annually at the federal interest rate of five and thirty-one hundredths percent (5.31%); and

That the defendant take nothing on its counterclaim, and that the counterclaim is dismissed on the merits; and

That the Plaintiff recover the costs of this action.

DATED at Portland, Oregon, this (1st) day of July, 1994.

(John Jelderks)
The Honorable John A. Jerderks
United States Magistrate Judge

AMENDMENT VII-CIVIL TRIALS

* * *

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FILED 94 JUN 27

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC., Plaintiff,	) Civil No. 91-1236-JE
AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendant.	) VERDICT

We, the jury, being duly empaneled and sworn to try the issues in this case, return our verdict as follows:

1. On plaintiff COT's claim for Breach of Contract we find:

(✓) In favor of plaintiff COT.

_____ In favor of defendant AT&T.

2. On plaintiff COT's claim for Intentional Interference with business relations we find:

(✓) In favor of plaintiff COT.

_____ In favor of defendant AT&T.

If you find in favor of COT on either of the above claims, answer question 3.

3. Damages are awarded to COT against AT&T in the amount of $(13,000,000.00)

* * * * * * * * * * * * * *

4. On defendant AT&T's counterclaim, we find:

_____ In favor of AT&T, and award damages in the amount of $_____.

(✓) In favor of COT.

Dated this (29th)of June, 1994.

(Linda C. Fitz-Armstrong)
Presiding Juror

(EXCERPT)

* * *

The terms of any applicable tariffs control the duties and rights of the parties. In other words, the parties could not make an agreement that was contrary to the terms of an applicable tariff. In this regard, I instruct you that there is tariff language which limits AT&T's liability. Under that language, AT&T may be liable to COT for breach of contract only if AT&T engaged in willful misconduct. To put it another way, the tariff specifically limits AT&T's potential liability, and COT cannot recover an award of dollar damages on its contract claim in the absence of willful misconduct on the part of AT&T.

Willful misconduct is defined as an intentional act or omission performed either with the knowledge that the act or omission will probably harm

someone else, or in a manner that implies reckless disregard of probable consequences to others. In determining the terms and conditions of the parties' agreements, you're to consider the three subscription agreements submitted in evidence as exhibits 39, 66, and 77.

* * *

THE COURT: Mr. McDermott just indicated presented to me at the bench off the record that he could have called expert witnesses, if he thought this would be an issue, to indicate that this type of -- I don't want to misquote you, Mr. McDermott, but the argument being that SDN technology would still be operating in the year 2013.

Am I misquoting you or misstating that?

MR. MCDERMOTT: Well, I certainly could call expert witnesses to testify that the technology is expected to continue past the year 2000. Certainly -- I mean, SDN began in 1985. It's already continued for nine years, and it's technology that's used in AT&T's world headquarters...

ER 2119

...today.

THE WITNESS: Your Honor, may I maybe add something or subtract something?

THE COURT: Sure. What I'm really trying to get at is whether you have the expertise, or whether anybody else does, to say what's going to be going on. As you indicated earlier, you'd run some projections out to the year 2013 and decided to cut off at the year 2000.

THE WITNESS: The -- I am looking at this more as a product life in a discounting basis, as opposed to the technology. I see no reason that any technology that might be coming up would make an SDN discounting nonfeasible. It is my understanding that SDN is still being sold, as I see no reason to say that in the foreseeable future -- at least there has been nothing that I have seen from AT&T or in the industry

that says we will not have - we are going to do away with a product type, SDN discounting before the year 2000. I haven't seen anything -- any indications.

And, quite frankly, maybe I should not have used the word technology per se, because we're really talking about a discounting program. The technology is the same whether one is using a futuristic technology that we have never talked about and discounting to ascertain that large -- to make certain that large users are bound to the AT&T system, as opposed to MCI or SPRINT. It's a marketing...

Hainline - D 1905

...focus or program, a marketing product I see, more than a technology per se.

And marketing programs have a tendency to have minor alterations over life -- over their marketing life and then to go through major changes.

Oftentimes competition starts to work towards coming up, whistles and bells are tacked on to programs, and then, finally, there's a settling out and somebody comes up with new, substantially radical whistles and bells. I'm not talking technology.

THE COURT: So I thought I heard you use the term technology. You're really talking about a marketing approach, as opposed to technology --

THE WITNESS: Yes.

THE COURT: -- in the true sense?

THE WITNESS: Yes. A marketing product life.

THE COURT: Mr. McDermott. Any other questions?

MR. MCDERMOTT: Your Honor, I might make one other proffer to the Court. It's my understanding that SDN today is being sold by AT&T in June of 1994 on at least a four-year contract basis.

That's at least until June of 1998. AT&T itself projects the technology will be good at least until that long.

THE COURT: Mr. Petranovich, your objection was on the basis that this witness is not qualified to testify...

ER 2120

Hainline - D 1906

...as to what's going on in the communications industry. And I agree with you in general, that he's not a communications expert, but we're really just, apparently, talking about a marketing concept.

There's a presumption that things remain as is unless there's evidence to indicate to the contrary. Mr. McDermott has represented -- proffered that the four-year contracts that could get us to at least 1998 with at least this type of marketing concept. So the-technology argument you make doesn't appear to have as much weight as I thought it did initially.

* * *

ER 2121

Hainline - D 1911

* * *

MR. PETRANOVICH: Can I have a continuing objective as to this stuff? This -- I'm sorry. May I have a continuing objection as to lost future profits on the basis of the technology objection, so I don't keep standing up and saying it?

THE COURT: Yes.

* * *

ER 2126

(3)

Supreme Court, U.S.
FILED
NOV 14 1997
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No. 97-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CENTRAL OFFICE TELEPHONE, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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November 14, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTION RESTATED

Whether the district court, after granting judgment as a matter of law against a portion of a jury's damages award, correctly determined based on the record that the portion of the jury's verdict that was not overturned was $1,154,000, and thus entered a judgment for that amount, rather than order a new trial.

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below. American Telephone and Telegraph Co. has, since the inception of this case, changed its name to AT&T Corp.

Pursuant to Supreme Court Rule 29.6, AT&T Corp. declares that it has no parent company. AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong)

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

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CENTRAL OFFICE TELEPHONE, INC.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

This is the second petition for a writ of certiorari that seeks review of the Ninth Circuit's judgment in *Central Office Telephone, Inc.* v. *American Telephone and Telegraph Co.*, 108 F.3d 981 (CA9 1997).

In the first petition, AT&T Corp. ("AT&T") asked the Court to review and reverse the divided panel's holding on liability. It demonstrated that the panel's holding (over Judge Brunetti's dissent) that a common carrier could be held liable, under state law, for breaching alleged promises to provide better service than required by its F.C.C. Tariff is contrary literally to a century of decisions of this Court and other courts of appeals—and

should be summarily reversed. *AT&T Corp.* v. *Central Office Telephone*, No. 97-679.

By contrast, the instant petition is filed by the plaintiff Central Office Telephone ("COT"). COT assumes that liability was correctly determined, and asks the Court to review the question whether the district court's and the Ninth Circuit's holdings concerning the amount of damages somehow violated the Seventh Amendment of the Constitution. Even if liability had been properly determined, however, this second petition is frivolous.

First, the Ninth Circuit's rejection of COT's Seventh Amendment claim was simply a correct application of well-settled principles. The holding does not conflict with any decisions of this Court or of another court of appeals. In particular, COT challenges the district court's decision to grant AT&T judgment as a matter of law concerning the portion of a jury's $13 million damages verdict that covered the period after the alleged contract ended and to enter judgment in the amount of $1,154,000. Although the jury's damages award was in the form of a general verdict, the district court found, based on its review of the record, that the jury "obviously" had awarded $1,154,000 for the period of time while the "contract" was to be in effect and that this amount was unaffected by the error of law. Pet. App. 53. As COT does not dispute, it is well settled that Rule 50 of the Federal Rules of Civil Procedure gives federal district courts the authority, consistent with the re-examination clause of the Seventh Amendment, to enter a judgment that excludes the "identifiable" portion of a jury's damages that could not be awarded as a matter of law, rather than to order a new trial. The district court's decision here, therefore, simply applied settled legal standards to the unique facts of the case. There is no conflict between the legal standard that the Ninth Circuit applied and the legal standards applied in decisions of any other court of appeals.

Second, even if the Ninth Circuit had accepted COT's Seventh Amendment claim, the court would have been required to order a new trial on liability as well as damages under this Court's holding in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and its numerous progeny. That would benefit AT&T and harm COT.

1. As more fully explained in AT&T's Petition (No. 97-679), COT is a reseller of long distance service that it purchases from long distance carriers at one rate and then provides at marked-up rates to COT's own customers. COT began purchasing and reselling AT&T's Software Defined Network ("SDN") in April of 1990. But COT terminated its SDN service in September 1992 after suing AT&T for previously violating alleged oral or implied agreements generally to provide better service than required by AT&T's tariff. Pet. App. 11-13.

The district court denied AT&T's motion to dismiss these state law claims under the filed tariff doctrine. At the jury trial on these claims, COT presented testimony from a single witness on the issue of damages, an accountant named Thomas Hainline. He presented a "lost profit study," which extrapolated from COT's SDN experience in reselling SDN during a seven-month period in 1990. On the basis of this experience, Hainline testified that, absent a breach of AT&T's extra-tariff agreements, COT would have realized " 'approximately 13 million' in past and future profits" through the year 2000. Pet. App. 42. The jury found in favor of COT and, consistent with Hainline's testimony, awarded $13 million in damages. Pet. App. 78.

2. The district court granted, in part, AT&T's motion for judgment as a matter of law. Foremost, the district court held that the applicable state law precluded COT from recovering lost profits for the period after it terminated the "contract" in September 1992. Pet. App. 63-65.

The district court further held that, for at least nine separate reasons, COT's "lost profits" evidence "clearly [was] not sufficient," even when viewed "with all reasonable inferences taken in favor of [COT]," to support any finding of damages for the period after COT terminated its service in September 1992. Pet. App. 61, *id.* 53-60. By contrast, although it held it was "a close question," the district court concluded that the evidence was sufficient "to support the jury's award of lost past profits up to COT's termination of its SDN sales in September 1992." Pet. App. 61. Reviewing the record of the trial, the district court noted that COT's damages witness, in coming to a total lost-profits calculation of "approximately 13 million" up to the year 2000, had calculated lost profits for the period through September 1992 as $1,154,000. Pet. App. 53. The district court then found that "[t]he jury's verdict of $13,000,000 [was] obviously based upon that total," and entered an amended judgment for $1,154,000. Pet. App. 53, 65.

The Ninth Circuit affirmed this decision and rejected COT's Seventh Amendment challenge. The Ninth Circuit noted that "Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside the verdict of the jury and enter judgment as a matter of law, and has been held to be constitutionally compatible with the Seventh Amendment." Pet. App. 24. The Ninth Circuit also rejected COT's claim that the district court's judgment as a matter of law was improperly based "on a truncated trial record," noting that, "contrary to COT's position," the district court had fully "considered the entirety of the testimony of COT's expert." Pet. App. 24.

3. As COT's Petition acknowledges (p. 6), it is well settled that entry of judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure does not run afoul of the Seventh Amendment right to jury trial. *See Galloway* v. *United States,* 319 U.S. 372, 389

(1943) (holding that a claim that the Seventh Amendment deprives federal courts of power to direct a verdict for insufficiency of evidence "has been foreclosed by repeated decisions made here consistently for nearly a century"). Similarly, this Court long ago recognized that, when judgment as a matter of law is warranted for some, but not all, of the damages entered by a jury, a federal court has authority, consistent with the Seventh Amendment, to enter judgment for an identifiable portion of the jury's original damage award, rather than order a new trial as to the entire case. *See Insurance Co.* v. *Piaggio*, 83 U.S. (16 Wall.) 378, 386-88 (1872) (holding that judgment should be modified to disallow a portion of damages awarded by jury where it is "apparent in the record" that this portion alone was in error as a matter of law); *New York, Lake Erie & W. R.R.* v. *Estill*, 147 U.S. 591, 622-23 (1893) (ordering that judgment be reduced by the amounts attributable to interest charges, which were improperly imposed as a matter of state law).

The courts of appeals also consistently have applied the rule that, where it is apparent as a matter of law from the record that a portion of a jury award is improper, a court may modify the judgment to eliminate that portion of the award, rather than ordering a new trial. *See* 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2815, p. 159 (2d ed. 1995) (citing cases and noting court's authority to enter judgment for reduced damages in this circumstance). Numerous court of appeals decisions have uniformly so held.[1]

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[1] For example, in *Garrett* v. *Faust*, 183 F.2d 625, 629 (CA3 1950), the Third Circuit disallowed that portion of the jury's damage award attributable to breach of contract and fraudulent misrepresentation claims that were unsupported by the evidence, but held that there was "no reason why" the "balance of the verdict, amounting to $3,609.10, being clearly identifiable as representing the jury's determination of the amount due[,]" "should not stand." *See also McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (CA7 1984) (noting that a federal court may set aside a jury verdict and

Indeed, even the cases on which COT relies (Pet. 10-12) acknowledge a federal court's authority to enter a judgment for a reduced amount of damages "where it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there." *Bereda* v. *Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 55 (CA3 1989); *see Nissho-IWAI Co.* v. *Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1547-48 (CA5 1984) (noting that a new trial was required only because the court could not tell from the record how much of the jury's award was attributable to a time period for which no damages should have been awarded). COT thus recognizes that a federal court may, consistent with the Seventh Amendment, reduce a jury verdict on damages when based on "a judgment as a matter of law pertaining to a discernibly separate and distinct issue or award." Pet. 13.

These are the legal standards the district court and Ninth Circuit applied to the particular facts of this case. COT's Petition makes explicit that its disagreement with the district court and Ninth Circuit is not with these legal determinations, but with their application. The linchpin of COT's claim is its inherently factbound assertion that, "[*i*]*n this case,* the verdict does not clearly indicate how it was arrived at or what it contemplates." Pet. 12 (emphasis added). However, the district court and the Ninth Circuit came to the exact opposite conclusion based on their review of the evidence. The district court found that

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"fix the proper level of damages" if "the plaintiff is entitled to a particular amount of damages as a matter of law"); *Westchester Fire Ins. Co.* v. *Hanley*, 284 F.2d 409, 418 (CA6 1960) (ordering reduction of jury award by 25% required as a matter of law by apportionment clause of insurance policy, where "[i]t [was] obvious that the jury made no reduction of the damages found by applying the apportionment clause"); *State of Washington* v. *United States*, 214 F.2d 33 (CA9 1954) (affirming trial court decision setting aside verdict of $581,721.91 because it was not based on sufficient evidence and entering judgment in the amount of $1.00 as nominal damages).

the $13,000,000 damages award was "obviously based upon" testimony of COT's expert where he calculated lost profits up to September 1992 as $1,154,000, and lost profits for the following seven years as $12,059,800, for a total, as the expert testified, of "approximately $13,-000,000." Pet. App. 53. Petitioner COT's claim, therefore, raises nothing more than a dispute over whether the identifiable portion of damages awarded up to September 1992 "obviously" was $1,154,000. Such a factual question resolved by both lower courts does not merit review by this Court.

Moreover, even if the district court had erred in making its factual determination that the jury necessarily had set damages for the period up to September 1992 at $1,154,-000, this error redounds to the benefit of Petitioner COT. The only appropriate alternative available was to order a new trial on liability as well as damages—which could have resulted in a finding of no liability against AT&T, and in fact, given AT&T's substantial counterclaims, could have resulted in an award of substantial damages for AT&T. In this regard, there is no basis for COT's repeated assertions that the district court, under these circumstances, "has no alternative" but to order a partial new trial limited to the issue of damages (Pet. 10, 18), rather than ordering a new trial as to all issues. Partial new trials are permissible only in narrowly restricted circumstances, as this Court made clear in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931):

> "[A] partial new trial . . . may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. . . . Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

Here, like in *Gasoline Products*, issues of damages and liability are closely interwoven, and thus there could not properly be a retrial limited to damages only.

For example, as in *Gasoline Products*, a jury on retrial could not determine COT's damages "unless also advised of the terms of the contract," 283 U.S. at 499, which would be impossible here because the original jury was allowed to determine terms of various "side deals" that formed the basis for COT's state-law claims, and did not return a special verdict concerning the terms of such side deals. *See also, e.g., Ajax Hardware Mfg. Corp.* v. *Industrial Plants Corp.*, 569 F.2d 181, 185 (CA2 1977) (ordering new trial on both liability and damages where it "cannot be said that there 'clearly' was no relationship" between the erroneous findings and those which otherwise would have been upheld); *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, 513 F.2d 407, 422 (CADC 1975) (ordering new trial on both liability and damages because the court "lack[ed] reasonable assurance" that the sustainable findings were not tainted); *Williams* v. *Slade*, 431 F.2d 605, 608 (CA5 1970) ("[A] court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial."); *Romer* v. *Baldwin*, 317 F.2d 919, 922-23 (CA3 1963) (holding that partial new trials should be granted " 'only in those cases where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue,' " (quoting *Thompson* v. *Camp*, 167 F.2d 733, 734 (6th Cir. 1948)).

4. Petitioner COT also asserts that this Court should review whether, in determining the sufficiency of the evidence under Rule 50 of the Federal Rules of Civil Procedure, a trial court properly can exclude from its consideration evidence that was erroneously admitted at trial. Pet.

19-24. That issue, however, is not raised in this case. The district court plainly *did* consider all the evidence presented in reviewing AT&T's Rule 50 motion for a judgment as a matter of law, and thus did not, as COT wrongly asserts, rely on a "truncated record," Pet. 19.

Petitioner COT's claim relies on decisions of some courts of appeals holding that a trial court may not grant a judgment notwithstanding the verdict by ignoring evidence admitted at trial on the ground that the admission was in error. *See Midcontinent Broad. Co.* v. *North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (CA8 1973); *Jackson* v. *Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (CA11 1993). Here, neither the district court nor the Ninth Circuit disagreed with these decisions. Indeed, the Ninth Circuit expressly accepted rule that "a trial judge must consider all evidence submitted in ruling on a motion for judgment as a matter of law," and cited with approval the Eighth Circuit's *Midcontinent Broadcasting* opinion. Pet. App. 24. COT's claim that the Ninth Circuit's opinion is in conflict with these other circuits (Pet. 23), therefore, is simply wrong.

In an effort to create a conflict where there is none, COT repeatedly mischaracterizes the district court's decision as having been based on a "truncated record," and having hinged on the admissibility of COT's damages testimony. Pet. 20-23. In fact, the district court's decision granting judgment as a matter of law hinged on the determination that an award of damages after September 1992 was barred by state contract law (Pet. App. 63-65) and that there "clearly" was insufficient evidence to support any damages award for the period after September 1992 (Pet. App. 61). In making this determination, the district court expressly and in great detail considered the testimony of COT's damages witness and found that this testimony provided no support for any such damages. Pet. App. 52-65. The district court's determination, there-

fore, is fully consistent with each of the court of appeals decisions cited by COT, where the courts deemed it improper for a trial court to *exclude* from their consideration of the sufficiency of evidence any testimony that they later determined was erroneously admitted.[2]

Nor is there any unfairness in this outcome, as COT claims. Pet. 24-27. The burden was on COT to prove damages, and COT had full opportunity to introduce whatever evidence it deemed necessary to meet its burden. COT chose only to present a single witness on this issue, whose testimony, as the district court found, was entirely lacking on a series of separate grounds even when viewed in a light most favorable to COT. There is no "unfairness" in finding that a party has submitted insufficient proof to meet its burden, without granting that party a second chance to present additional evidence.

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[2] *See Midcontinent Broad. Co.* v. *North Cent. Airlines, Inc.*, 471 F.2d 357, 358 (CA8 1973) ("Although the trial court found insufficient evidence to sustain the verdict, it did so only after excluding plaintiff's expert testimony which had been presented to the jury."); *Jackson* v. *Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695 (CA11 1993) ("The district court held that when the expert's testimony was struck from the record, [plaintiff] had failed to make out a prima facie case . . . ."); *Douglass* v. *Eaton Corp.*, 956 F.2d 1339, 1343 (CA6 1992) (After determining that certain evidence should have been excluded at trial, "[t]he district court held that the remaining evidence was insufficient to support the jury verdict."); *Dixon* v. *International Harvester Co.*, 754 F.2d 573, 580 (CA5 1985) (Plaintiff's expert "testimony should have been considered by the district court in examining the sufficiency of the evidence," because a trial court "cannot enter judgment on a record altered by the elimination of incompetent evidence."); *Persinger* v. *Norfolk & W. Ry.*, 920 F.2d 1185, 1189 (CA4 1990) ("The district judge determined that, other than [expert testimony that should have been excluded], [plaintiff] had not presented any evidence of negligence.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-656

In The

Supreme Court of the United States

October Term, 1997

CENTRAL OFFICE TELEPHONE, INC.,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY TO BRIEF OF RESPONDENT AT&T IN OPPOSITION TO PETITION

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REASONS FOR GRANTING THE WRIT

1. Initially, it is necessary to correct a misstatement by AT&T in the very first line of its brief. This is not, as AT&T states, the second petition that seeks review of the Ninth Circuit's judgment below. This is the first petition, having been filed August 27, 1997, and placed on the docket October 15, 1997. Appendix to COT's Reply (hereinafter "Reply App.") 1. AT&T's petition, related to the filed rate doctrine, is the second petition. It was filed October 16, 1997, and placed on the docket October 17, 1997. Reply App. 3.

2. AT&T next describes COT's claims in a manner that is also incorrect. AT&T was not held liable for merely "breaching alleged promises to provide better service than required by its F.C.C. Tariff." AT&T's Brief in Opposition (hereinafter "AT&T Br.") 1. AT&T was held liable for willful misconduct, including its intentional interference with COT's business relationships with customers. COT's Petition Appendix (hereinafter "COT Pet. App.") 77. This misstatement, and several other misstatements made by AT&T in its strained attempt to invoke the filed rate doctrine, are corrected with specificity in COT's Respondent's Brief in Opposition to AT&T's Petition for Certiorari (No. 97-679) at 4-8. That discussion will not be repeated here.

3. Third, AT&T asserts that the relief COT seeks, a new trial, would benefit AT&T and harm COT. COT strongly disagrees with any assertion that it is not in

its interest to seek a new trial in this case. A jury decided in favor of COT on its claims and found that COT had sustained $13,000,000 in damages. The district court reduced that amount to $1,154,000 and invaded the province of the jury in doing so. A new trial will not harm COT. It will relieve COT from the district court's error in denying a remititur and will allow COT to present evidence of damages far in excess of the amount fixed by the district court. Further, contrary to AT&T's assertions, a new trial would be as to damages only. As COT's petition demonstrates (COT's Petition for Certiorari (hereinafter "COT Pet.") at 16-17), this is not a case where liability and damages are interwoven, and so a new trial as to liability is unnecessary.

4. AT&T cites several cases for its proposition that a trial court has the authority, consistent with the Seventh Amendment, to enter judgment for an identifiable portion of the jury's damage award, rather than order a new trial. However, all of the cases cited are readily distinguished in that they truly involved awards for distinctly separate damage amounts.

In New Orleans Insurance Company v. Piaggio, 83 U.S. 378, 21 L. Ed. 358 (1872), the jury awarded $7,000 under an insurance policy for a wrecked vessel, $5,700 under a separate policy for the freight in the vessel, "and the further sum of $5,000" for the detention of the money due under the policies. Since the latter $5,000 was not legally supported, it was taken away without a new trial. Indeed, the Court noted that the jury's verdict was in the

nature of a special verdict, which, unlike a general verdict, can be corrected without a new trial. 83 U.S. at 387.

New York, Lake Erie and W.R. Co. v. Estill, 147 U.S. 591, 13 S. Ct. 444 (1893), involved the denial of a separate allowance of interest, which was not recoverable under the law at issue.

Garrett v. Faust, 183 F.2d 625 (3rd Cir. 1950), cert. denied, 340 U.S. 931 (1951), was a case in which interrogatories were submitted to the jury, so it again required no intuition by the trial court as to how much of the damages were legally unsupported.

McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984), also cited by AT&T in support of its proposition, in fact stands for just the opposite. The Seventh Circuit held that the trial judge, who had remitted $20,000 of the damages assessed by the jury, violated proper procedure in failing to give the plaintiff the option of a new trial:

> The Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury. A federal judge can set aside a jury verdict as excessive, but he can fix the proper level of damages only if the plaintiff is entitled to a particular amount of damages as a matter of law (for example where a statute specifies a fixed sum as liquidated damages for a

> violation) -- which is not the case here.

750 F.2d at 1392.

In Westchester Fire Ins. Co. v. Hanley, 284 F.2d 409 (6th Cir. 1960), cert. denied, 365 U.S. 869 (1961), the jury was not instructed that an apportionment clause in an insurance policy limited a plaintiff's recovery to 75% of its damages. In fact, the trial court incorrectly instructed the jury that it could award the full amount claimed without any reduction. 284 F.2d at 418. Again, no guessing or intuition was required to correct that error without a new trial.

In State of Washington v. United States, 214 F.2d 33 (9th Cir.), cert. denied, 348 U.S. 862 (1954), the trial court reduced a jury's verdict to nominal damages ($1.00) without ordering a new trial, rather than entering a judgment notwithstanding the verdict. However, the parties treated the procedure for purposes of the appeal as if the trial court had simply set aside the verdict as not supported by substantial evidence. 214 F.2d at 37. Moreover, the Ninth Circuit, while noting that the parties had so treated the procedure, expressly stated that it did not approve the procedure employed by the trial court. 214 F.2d at 36-37, n.1.

Finally, AT&T cites to 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2815 (2d ed. 1995).[1] It is interesting that

[1] AT&T's citation is to volume 10 of the treatise, but it is obvious that it meant to refer to volume 11.

AT&T cites to this discussion, since it concerns remittitur, which is precisely what COT was unconstitutionally denied in this case. And once again, this authority supports COT rather than AT&T:

> Except in those cases in which it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there, the court may not arbitrarily reduce the amount of damages, for to do so would deprive the parties of their constitutional right to a jury.[2]

Id. at 159.

Not one of the authorities cited by AT&T supports its position. There were no separately identifiable sums included in the jury's verdict in this case that the district court could properly have excised. COT Pet. 12. The district court and the Ninth Circuit have not simply misapplied a rule -- they have created an entirely new rule. This new rule would allow a trial court to reduce a general verdict for a flat sum, with no breakdown of amounts for specific items or specific periods, based on the trial court's

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[2] This treatise goes on to state that "the only theory [of remittitur] that has any reasonable claim of being consistent with the Seventh Amendment "is for a trial court to set a remittitur at the maximum amount the jury could have awarded." Id. at 167-68. Here, the district court simply entered a judgment in the amount it believed the jury should have awarded. It failed to grant COT a remittitur with the option of a new trial, in violation of the Seventh Amendment.

own guess or intuition as to what the jury might have found.

AT&T also asserts that COT's petition should be denied because the decisions below are "inherently factbound." AT&T Br. 6. But that is precisely the point. Factfinding in a jury trial is for the jury, not the judge. The district court simply had no place in substituting its view of the evidence for the jury's, at least not without offering COT a remittitur. The new procedure followed by the district court and affirmed by the Ninth Circuit violates the reexamination clause of the Seventh Amendment and cannot be permitted to stand.

5. The district court and the Ninth Circuit have also created a radical new procedure with respect to evidence that the trial court determines post-trial it should not have admitted. As stated in COT's petition, all other courts that have considered the issue have held that the only appropriate relief when this occurs is for the trial court to order a new trial. Not so here. Instead, the Ninth Circuit has published a decision stating that a trial court may reduce a verdict without ordering a new trial simply by excising evidence of damages admitted at trial, so long as the trial court considers the evidence before disregarding it. Merely describing the procedure that was employed in this case demonstrates how nonsensical it is.

The post-trial exclusion of COT's damages evidence is not merely an issue of fairness, although it

certainly was unfair to COT in this case.[3] Rules 50 and 59 and the procedures through which they are applied have been carefully crafted so as not to violate the reexamination clause. By ignoring those procedures and allowing a trial court to disregard evidence considered by a jury, the reexamination clause was clearly violated in this case.

But this issue does not merely involve this case. Instead, the Ninth Circuit's decision represents an open invitation for trial courts to disregard evidence admitted at trial, fail to order a new trial, and reduce a jury's verdict to the amount the trial court believes the jury should have awarded. All that a trial court must do to invade the province of the jury in this manner is to say that it considered the evidence before disregarding it. Such a procedure is not merely nonsensical, it is also a dangerous threat to the Seventh Amendment. This Court should revoke the Ninth Circuit's open invitation before it is accepted by any other district courts.

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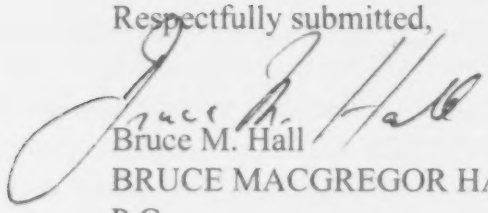
[3] It is highly disingenuous for AT&T to argue that COT had a fair opportunity at trial to present additional expert witnesses on damages, as if COT simply failed to do so. In fact, COT offered to present additional witnesses as to damages, but was led by the district court's rulings to believe this was not necessary. COT Pet. App. 81-86.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

SUPREME COURT OF THE UNITED STATES

Central Office Telephone
Petitioner

v. No. 97-656

AT&T
Respondent

To David W. Carpenter Counsel for Respondent:

YOU ARE HEREBY NOTIFIED pursuant to Rule 12.3 that a petition for writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on August 27, 1997, and placed on the docket October 15, 1997. Pursuant to Rule 15.3, the due date for a brief in opposition is November 14, 1997. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday, or federal legal holiday.

Unless the Solicitor General of the United States represents the respondent, an appearance/waiver form is enclosed and should be sent to the Clerk only in the event you do not intend to file a response to the petition.

Your attention is directed to Rule 9 of the Rules of the Supreme Court reproduced on the back of the

appearance form. Only counsel of record will receive notification of the Court's action in this case.

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NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.

SUPREME COURT OF THE UNITED STATES

AT&T
Petitioner

v. No. 97-679

Central Office Telephone
Respondent

To Bruce M. Hall Counsel for Respondent:

YOU ARE HEREBY NOTIFIED pursuant to Rule 12.3 that a petition for writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on October 16, 1997, and placed on the docket October 17, 1997. Pursuant to Rule 15.3, the due date for a brief in opposition is November 16, 1997. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday, or federal legal holiday.

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appearance form. Only counsel of record will receive notification of the Court's action in this case.

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Telephone Number

NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.